TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 348.

TERMINAL TAXICAB COMPANY, INCORPORATED, APPELLANT,

vs.

CHARLES W. KUTZ, OLIVER P. NEWMAN, AND LOUIS BROWNLOW, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, CONSTITUTING AS SUCH COMMISSIONERS THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 15, 1916.

(24,555)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1915.

1 In the Court of Appeals of the District of Columbia.

No. 2691.

TERMINAL TAXICAB CO., &c., Appellant,
vs.
CHESTER HARDING et al.

Supreme Court of the District of Columbia.

In Equity. No. 32374.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Plaintiff,
v.
CHESTER HARDING, OLIVER P. NEWMAN, and FREDERICK L. Siddons, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Original Bill.

Filed January 15, 1914.

In the Supreme Court of the District of Columbia.

In Equity. No. 32374.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Plaintiff,
v.
CHESTER HARDING, OLIVER P. NEWMAN, and FREDERICK L. Siddons, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate, Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

The bill of the above named plaintiff respectfully sheweth to the Court as follows:

2 1. That it is a body corporate under and by virtue of a certain Certificate of Incorporation dated the 7th day of May,

1908, and recorded in the office of the Secretary of the Commonwealth of the State of Virginia on the 13th day of May, 1908, under and by virtue of the general incorporation laws of the State of Virginia, in which Certificate of Incorporation it is given the corporate name of, "Terminal Taxicab Company, Incorporated," and is engaged in business in the District of Columbia.

2. That the defendants, Chester Harding, Oliver P. Newman and Frederick L. Siddons, are the duly appointed and qualified Commissioners of the District of Columbia and are acting as such; that by virtue of Section 8 of an Act of Congress approved March 4th, 1913, entitled, "An Act Making Appropriations to Provide for the Expenses of the Government of the District of Columbia for the Fiscal Year Ending June 30th, 1914, and for other Purposes," and especially by virtue of Paragraphs 1 and 97 of said Section 8, the defendants, as Commissioners of the District of Columbia, are as a governmental and administrative agency vested with the powers and duties of a Public Utilities Commission of the District of Columbia as additional and super-added powers to their powers and duties as Commissioners of the District of Columbia.

3. That the said defendants, Commissioners as aforesaid, have duly organized and qualified as said Public Utilities Commission and are acting as such; that the said defendants, Commissioners as aforesaid, are citizens of the United States and residents of the District of Columbia, and are sued as Commissioners of the District of Columbia and as such constituting the said Public Utilities Commission.

That the plaintiff hereto is advised that the said defendants constituting such Public Utilities Commission of the District of Columbia as aforesaid have heretofore claimed, and do now claim, that as such Public Utilities Commission of the District of Columbia they constitute and are a body corporate, having a corporate seal and capable of suing, and being sued in its corporate name, to wit: "The Public Utilities Commission of the District of Columbia." That while the plaintiff cannot admit such to be the fact, it is advised and believes that it is entitled to make the said alleged body corporate a defendant in its alleged corporate name and, therefore, also sues the said defendants as such alleged corporation.

4. That under and by virtue of the power and authority granted to it by the State of Virginia by its Certificate of Incorporation hereinbefore referred to, a copy of which is hereto attached and marked, "Plaintiff's Exhibit A," and prayed to be taken and read as a part hereof, and especially by Paragraph 7 of the said Certificate of Incorporation, the plaintiff is authorized and empowered to engage in the following classes of business, to wit:

"7. The purposes for which said corporation is formed are to manufacture, build, construct, operate, let for hire, buy, sell, deal in, and deal with taxicabs, locomobiles, automobiles, motorcycles,
3 power boats, and vehicles of every kind, nature and description, whether propelled by horse or mechanical power.

"To transfer, carry and transport by means of such taxicabs, locomobiles, automobiles, motorcycles, power boats, and vehicles of every

kind, nature and description, whether propelled by horse or mechanical power, passengers, goods, baggage, merchandise and other personal property of every kind, nature and description, from or to any points or places in the United States or elsewhere; but not to exercise any of the powers of a public service corporation.

"To build, purchase, lease, maintain and operate buildings, stables, storage houses and garages for the storing, caring for and keeping for hire therein of taxicabs, locomobiles, automobiles, motorcycles, power boats, and other vehicles of every kind, nature and description, whether propelled by horse or mechanical power.

"To buy, sell, and deal in machinery, goods, wares and merchandise of every kind, nature and description necessary for, or incidental to the operation, repair or equipment of taxicabs, locomobiles, automobiles, motorcycles, power boats and vehicles of every kind, nature and description, whether propelled by horse or mechanical power.

"To manufacture, accumulate, deal in, deal with, buy, sell, transfer and supply compressed air, gasoline and electrical and other power, agencies or things necessary or useful for such business;

"To buy, sell and convey property, both real and personal, as the same shall be necessary for the purposes of said business; to contract or arrange with railroads, ferries, steamboats and other companies or individuals, to transfer, carry and transport such persons and property and generally to do and transact, conduct and operate a general livery and transportation business by means of such taxicabs, locomobiles, automobiles, motorcycles, power boats and vehicles of every kind, nature and description, whether propelled by horse or mechanical power, and with all the rights, powers and privileges necessary or desirable for the transaction of such business, or incident to the conduct of same."

That by said Certificate of Incorporation, as aforesaid, and by the laws of the State of Virginia, the plaintiff is expressly prohibited from exercising any of the powers of a public service corporation.

That the plaintiff in pursuance of said powers and authority is now and has heretofore been the owner, and operator of a number of automobile vehicles for private livery purposes and use in the District of Columbia and elsewhere; that in pursuance of such private automobile livery business it maintains its principal offices and its main garage in premises known as 1229-1231-20th Street, northwest, in the City of Washington, D. C., and a branch garage upon the premises of the Washington Terminal Company known as the Union Station; that at such garage it conducts such private automobile livery business by hiring its vehicles to such persons as it sees fit under private contracts or agreements with such persons for the private and exclusive use of such vehicles.

4 That it also undertakes by private contract with proprietors of certain hotels and other concerns engaged in private business and other enterprises in the District of Columbia, to furnish such private automobile livery service as may be required by such hotels and other concerns, their guests and patrons; that the said plaintiff makes various charges for such livery service depending upon the character of the service performed, the size and style of the

vehicle engaged, and other elements entering into the conditions under which the various agreements are performed, and generally with an express understanding with its patrons as to what the basis of the charges will be; the basis of which rates and the conditions under which such service is performed are more particularly illustrated and set forth by reference to a card marked "Plaintiff's Exhibit B," hereto attached and prayed to be taken and read as a part hereof; that a large proportion of plaintiff's livery business is done under a private agreement with the Washington Terminal Company to furnish at its Union Station an exclusive and private automobile livery service for the patrons of the said Union Station, the character of which service and the rates charged therefor being under the control of the said Washington Terminal Company, and in accordance with conditions prescribed by the said Washington Terminal Company; said business being performed solely and exclusively upon the premises of the said Washington Terminal Company, and such portion thereof as is leased by the terms of said private agreement to the plaintiff.

That such service as is performed for the guests and patrons of the various hotels and others with whom said plaintiff has private agreements, as aforesaid, is under the control of and is performed in accordance with conditions prescribed by the proprietors of the said hotels, etc., and not otherwise; that all other business and automobile livery service engaged in and performed by the said plaintiff is done at and through its general offices and principal place of business in the District of Columbia, located at 1229-1231-20th Street, northwest, as aforesaid.

That the said plaintiff since the 1st day of July, 1913, thereafter and now has been and is engaged in no class or kind of transportation business for hire other than such as is described above; that it is not, and since the aforesaid July 1st, 1913, has not been, operating any public hacks, taxicabs or other public vehicles in the District of Columbia for hire under license from the District of Columbia or otherwise.

That at no time either prior to or since the said 1st day of July, 1913, has the plaintiff ever engaged in the business of a common carrier, either of passengers or of goods or property; that neither prior to nor since the said 1st day of July, 1913, has the said plaintiff ever engaged in the business of owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire or otherwise; that prior to the said 1st day of July, 1913, the said plaintiff did own and operate certain licensed hacks for hire, for which it paid to the District of Columbia the annual license fee or tax prescribed
5 by Paragraph 11 of Section 7 of an Act of Congress approved July 1st, 1902, known as "The Appropriation Act for the District of Columbia for the Fiscal Year Ending June 30th, 1903," commonly known as "The Personal Property and License Tax Law"; that such automobile hacks or licensed vehicles were, prior to the said 1st day of July, 1913, operated by the said plaintiff in accordance with certain Police Regulations of the District of Columbia, with

respect thereto, and were offered for public hire upon the streets and public hack stands of the District of Columbia in accordance with said Police Regulations of the District of Columbia, a copy of which Police Regulations, marked, "Plaintiff's Exhibit C," then and now in force is attached hereto and so much thereof as is pertinent to this bill is prayed to be taken and read as a part hereof.

That on to wit: the 30th day of June, 1913, the said public hack licenses expired and the same were not renewed, nor were any such licenses thereafter taken out by the said plaintiff, and all such public hack, taxicab or other automobile business upon the public streets in the City of Washington, D. C. was thereafter abandoned and has never since been resumed, and it is not the intention, wish or purpose of this plaintiff to resume the same or any other transportation business of a public nature; that by reason of the very small amount of business which originates upon the public streets and the high rate required to be paid for public hack licenses in order that such public business may be performed, such public hack business as was done by the vehicles of the Terminal Taxicab Company, Incorporated, operating as licensed public hacks prior to the said 1st day of July, 1913, was performed without any profit, and in fact at a heavy percentage of loss, for which reason, among others, the said public hack business was abandoned prior to the said 1st day of July, 1913.

That the said public hack business when engaged in prior to the 1st day of July, 1913, was so engaged in by the plaintiff under the belief that it was not such a business as came within the inhibition of its charter or Certificate of Incorporation, which in express terms prohibits the plaintiff exercising any of the powers of a public service corporation.

That as soon as the said plaintiff became aware that the Public Utilities Commission of the District of Columbia considered such licensed hack business to be that of owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire, within the meaning of Section 8, Paragraph 1 of the said Act of Congress approved March 4th, 1913, known as "The Public Utilities Act," the plaintiff on to wit: the 16th day of April, 1913, notified the said Commission that it would discontinue such business, abandon such public hack licenses as it had taken out and cease to do any business of a public character or business upon the streets of the District of Columbia; that a copy of the letter so notifying the said Commission is hereto attached, marked "Plaintiff's Exhibit D," and is prayed to be taken and read as a part hereof.

6 That in every instance in which the vehicles of this plaintiff have been hired, whether before or since the said 1st day of July, 1913, such hiring has been for the private and exclusive use of the person to whom such vehicle was let; that in every such instance the complete control and exclusive use of such vehicle has been under the sole direction of the person to whom the same has been hired. Such person has had the right to direct the destination of such vehicle at his or her pleasure, to occupy it alone or accompanied by his or her guests or not, according to his or her choice, and

for any length of time, to exclude from such vehicle any and every other person, whether there was room in the vehicle for others or not, and, in short, to use the vehicle while so hired in his or her service precisely as though it were the private property of the person so hiring it. In most instances the plaintiff has not known at the time of hiring the vehicle what its use would be, nor whether it would be used in the District of Columbia or elsewhere.

That the plaintiff in the conduct of its private livery business, as aforesaid, has always reserved the right to refuse service to any person whomsoever at its pleasure and to determine in each instance whether it will or will not engage for the particular service desired.

That while the rates charged by the plaintiff in cases where its vehicles equipped with recording instruments known as "taximeters," are engaged upon the basis of the distance to be covered by the service are in the main the same as the rates for similar service performed by licensed public hacks as prescribed by the Regulations of the District of Columbia, nevertheless such rates have differed and do now differ from such public rates, and this plaintiff has established such of its private rates upon this basis for the purpose of meeting the competition to which it is subjected by other private livery concerns in the same line of business, as well as the competition of certain licensed public hacks, and not because of any law or regulation affecting the conduct of its business and the rates which it is permitted to charge. That in pursuance of its intention to confine its business to that of a strictly private livery, the plaintiff, not only by verbal instructions from its Manager to its drivers and other employees has forbidden their accepting any business from persons on the public streets, or otherwise than at its garages or from the proprietors of the hotels and other persons with whom it has special contracts, but such instructions were on the 15th day of July, 1913, put in writing in the form of a bulletin addressed to all the employees of the Terminal Taxicab Company, Incorporated, as follows:

"The cabs and touring cars of this Company are not public vehicles and are not licensed to do a public hack business. The Company, being a private livery, handles only such business as it may choose to dispatch from its garages, or business of the guests and patrons of such hotels, clubs and other institutions as it is under contract to serve. Drivers will be summarily dismissed for accepting or performing any other class of business.

(Signed) "JOHN J. BOOBAR,
Secretary."

7 That the plaintiff has at no time advertised or held itself out to the Public as undertaking for hire to carry all persons indifferently who may apply for passage, nor is it willing so to do. Although advertising for business, it has never in any such advertisement represented that its vehicles may be had otherwise than by communicating with its garage or principal place of business, the telephone number of which is North 1212; that in order to guard against giving the impression that its vehicles are for public use, the plaintiff has taken the precaution to place upon such of its vehicles

as are in the service of the hotels aforesaid, and while in such service, cards bearing the following inscription, "For guests and patrons of this hotel only."

In addition to the private livery business as hereinbefore described, the plaintiff is also engaged in the District of Columbia in the business of storing for hire in its main garage at 1229-1231-20th Street, northwest, many privately owned touring cars and other automobiles, and is also engaged in the business of repairing automobiles generally, and in the sale of accessories therefor, all of which business it conducts in connection with its business as a private automobile livery.

5. The plaintiff further says that on or about the 5th day of April, 1913, it received from the Public Utilities Commission of the District of Columbia a letter signed by J. L. Schley, the Executive Officer of said Commission, addressed to the plaintiff, the Terminal Taxicab Company, Incorporated, enclosing copy of an order of the said Commission No. 6, said Order No. 6 requiring that each and every public utility operating in the District of Columbia should make certain reports to the said Commission, a copy of which letter and of which order is hereto attached, marked, "Plaintiff's Exhibit E", and prayed to be taken and read as a part hereof; that under date of April 12th, 1913, the said Public Utilities Commission again addressed a letter to the Terminal Taxicab Company, Incorporated, signed by its said Executive Officer, requesting the plaintiff to furnish certain information to the said Commission, to which said letter the plaintiff on April 16th, 1913, replied by letter addressed to the Public Utilities Commission of the District of Columbia denying the jurisdiction of the Public Utilities Commission of the District of Columbia over the plaintiff, the Terminal Taxicab Company, Incorporated, and calling the Commission's attention to the fact that the aforesaid Public Utilities Act did not confer said jurisdiction; copies of the two letters of April 12th and 16th, respectively, are hereto attached, marked, "Plaintiff's Exhibit F", and are prayed to be taken and read as part hereof. Subsequently on various dates, the said Public Utilities Commission by letters called upon the said plaintiff for various information, asserting its alleged jurisdiction over the plaintiff as an alleged public utility within the scope of the said Public Utilities Act.

On the 3rd day of July, 1913, the said Public Utilities Commission by letter to the plaintiff, signed by the Executive Officer of the Commission, notified the plaintiff of a public hearing to be held on July 14th, 1913, for the purpose of determining its jurisdiction
8 over certain alleged public utilities in the District of Columbia, questioning its jurisdiction, which said letter was as follows:—

"Public Utilities Commission of the District of Columbia, Washington.

"July 3, 1913.

"Terminal Taxicab Company, 1225 20th Street N. W., Washington, D. C.

GENTLEMEN: You are hereby informed that the Public Utilities Commission of the District of Columbia will hold a public hearing

in the Board Room at the District Building Monday July 14th at 10:00 o'clock A. M. for the purpose of determining its jurisdiction over public utilities in the District of Columbia questioning such jurisdiction. This hearing was to have been held June 27th, but was postoponed at the request of one of the public utilities.

"The Commission having received from you a letter questioning its jurisdiction in your case, you are requested to appear on the date and at the time and place named to present your contentions in the matter.

"Respectfully,
(Signed) "J. L. SCHLEY,
"Executive Officer."

And on the said 14th day of July, 1913, the said hearing was had, at which hearing the plaintiff, among other alleged public utilities, was present and was represented by its attorney, who appeared specially for it and in its name, and for the sole purpose of contesting the jurisdiction of the said Public Utilities Commission to take any action based upon the supposed jurisdiction of the said Commission over the said plaintiff by reason of any of the provisions of the said Act of Congress approved March 4th, 1913; that Chester Harding, Chairman of the said Commission, stated that the purpose of the hearing was to receive arguments from the corporations denying the jurisdiction of the said Commission, including the plaintiff; the said Chairman stated that the said Commission claimed jurisdiction over the said plaintiff, among others, because, as he stated, the law, meaning the said Public Utilities Act, "gives the Commission jurisdiction over common carriers, and it defines what it means by 'common carriers', the definition in the law being: 'The term 'common carrier' when used in this Section includes express companies and every corporation, street railway corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire." The Chairman thereupon asked the plaintiff, among others, to state why it did not come within the meaning of the term "common carrier", as defined in the Act. Thereupon counsel for the plaintiff made a statement, setting forth at some length the character of the business performed by the plaintiff and the legal interpretation to be placed upon the term "common
9 carrier" as used in the said Act of Congress, specifically denying that the said plaintiff was and is such common carrier, or that it was and is engaged in any business contemplated by the terms of the said Act of Congress. No conclusion having been reached by the said Commission as a result of the said hearing on the 14th day of July, 1913, the said Commission, by its Executive Officer, on the 12th day of September, 1913, addressed to the plaintiff the following letter, being notice of a further hearing to be held on the 24th day of September, 1913, as follows:—

"Public Utilities Commission of the District of Columbia.

WASHINGTON, September 12, 1913.

"Terminal Taxicab Co., 1225 20th St. N. W., Washington, D. C.

"SIR: The Public Utilities Commission of the District of Columbia will hold a public hearing in the Board Room (Room 500) at the District Building on Wednesday, September 24th, at 10:00 o'clock A. M. for the purpose of determining the jurisdiction of the Commission over those taxicab companies in the District of Columbia which question such jurisdiction. This hearing will be a continuation of the hearing held July 14, 1913.

"Respectfully,

(Signed) "J. L. SCHLEY,
"Executive Officer."

In pursuance of which notice, on the said 24th day of September, 1913, the plaintiff, again appearing specially by its counsel, attended a further hearing before the said Commission, which was stated by the Chairman of said Commission to be a continuation of the hearing of July 14th, 1913, concerning the question of the jurisdiction of the Commission over taxicabs and certain other transportation agencies within the District of Columbia. At said hearing, the said Commission examined, under oath, certain witnesses for the purpose of determining the character of the business conducted by this plaintiff and other so-called taxicab companies in the District of Columbia. At the conclusion of the said hearing on the 24th day of September, 1913, the said Commission adjourned the said hearing until 10:00 o'clock A. M. on Monday, September 29th, 1913, and thereupon on the said Monday, September 29th, 1913, the said hearing was resumed and further alleged testimony taken and witnesses examined, all of which testimony this plaintiff is informed and believes, and therefore avers, was incompetent and immaterial for the purpose of determining the question then and there to be determined, viz: Whether the said Terminal Taxicab Company, Incorporated, is a common carrier and was and is owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire within the meaning of the said Act of Congress.

And this plaintiff is informed and believes, and therefore avers, that the said proceedings and the said alleged taking of testimony were proceeded with under no rules or regulations of the said Commission, or of any other competent authority and was irregular and void, and of no effect, and that any decision or orders of the said Commission based upon such proceedings are therefore null and void; that the said hearings were informal and were conducted under no rules or regulations of the said Commission or otherwise, and were therefore not formal hearings required by Paragaph 38 of Section 8 of the said Public Utilities Act, and other parts of said Act applicable thereto.

6. That thereafter on to wit: the 3rd day of January, 1914, the said Public Utilities Commission decided "that the Terminal Taxicab

Company and the Federal Taxicab Company are engaged in the business of common carriers within the meaning of the Public Utilities Act, and therefore are within the jurisdiction of the Public Utilities Commission", and set forth said decision in a document known as, "Order No. 44", which is as follows:—

"Public Utilities Commission of the District of Columbia.

"Order No. 44.

"January 3, 1914.

"P. C. No. 7.

"In the Matter of The Jurisdiction of the Commission over The Terminal Taxicab Company, The Federal Taxicab Company, The Merchants Transfer & Storage Company, and the Blue Line Transfer Company.

"The Commission has before it for consideration the question of its jurisdiction over the following corporations engaged in the business of transportation within the District of Columbia:

"The Terminal Taxicab Company,

"The Federal Taxicab Company,

"The Merchants Transfer & Storage Company,

"The Blue Line Transfer Company.

"The history of these cases is as follows: In reply to a circular letter sent by the Commission on April 12, 1913, calling for certain information required by the Public Utilities Act to be [SEAL.] furnished the Commission, these companies declined to furnish the information on the ground that they were not common carriers and not under the jurisdiction of the Commission.

"Following the receipt of their communications declining to furnish the information, the Commission held public hearings in the matter on Monday, July 14, 1913, Wednesday, September 24, 1913, and Monday, September 29, 1913. At these hearings the companies were represented by their officers and counsel and their statements and arguments together with the testimony submitted in the case are of record in the files of the Commission.

"In view of all of the facts developed, the Commission decides:

"1. That the Terminal Taxicab Company and the Federal Taxicab Company are engaged in the business of common carriers within the meaning of the Public Utilities Act, and therefore are within the jurisdiction of the Public Utilities Commission.

11 "2. That the Blue Line Transfer Company is not within its jurisdiction.

"3. That the Merchants Transfer and Storage Company is not a common carrier as contemplated by the Public Utilities Act, and therefore that that Company does not come within its jurisdiction.

"In view of the foregoing it is

Ordered: "That the Terminal Taxicab Company and the Federal Taxicab Company, within ten days after the receipt of this order,

shall furnish to the Commission the information originally called for in their circular letter of April 12, 1913.

"A true copy:

[SEAL.] (Signed) "J. L. SCHLEY,
"Executive Officer."

"File (2). Companies. Bulletin Board. Press."

That by said order this plaintiff is required to submit to the alleged jurisdiction of the said Commission and to furnish to the said Commission certain information; that a copy of the said document constituting the decision of the said Commission and its said Order was served upon the plaintiff on the 5th day of January, 1914; that thereafter on the 9th day of January, 1914, this plaintiff filed with the said Public Utilities Commission a notice of its dissatisfaction with said Order and decision and of its intention to commence proceedings in equity in the Supreme Court of the District of Columbia against the said Commission and the individual members thereof, as well as the Commissioners of the District of Columbia acting as such Public Utilities Commission, to vacate and set aside said Order; a copy of which notice of dissatisfaction and appeal is hereto attached, marked, "Plaintiff's Exhibit G", and prayed to be taken and read as part hereof.

And thereafter on the 10th day of January, 1914, this plaintiff by its attorney requested this Commission under the authority of Paragraph 64 of Section 8 of the said Public Utilities Act, to suspend the said decision or Order pending the decision of said bill or proceeding in equity, which said request the said Commission on the same day, January 10th, 1914, denied in writing by letter, as follows:—

"Public Utilities Commission of the District of Columbia,
Washington.

"January 10, 1914.

"DEAR SIR: In reply to your letter of today, I have to advise you that the Public Utilities Commission has considered your request that, pending the decision of your appeal to the court having jurisdiction, the order of the Commission, No. 44, in the matter of its jurisdiction over the Terminal Taxicab Company, be suspended; and feels constrained to decline your request.

"Respectfully,
(Signed) "CHESTER HARDING,
"Chairman.

"Mr. G. Thomas Dunlop, Attorney for Terminal Taxicab Company, Fendall Building, City."

12 That on the date of January 14th, 1914, this plaintiff received the following letter from the Public Utilities Commission of the District of Columbia, signed by their Executive Officer, as follows:

"Public Utilities Commission of the District of Columbia,
Washington.

"January 10, 1914.

"Terminal Taxicab Company, c/o G. Thomas Dunlop, Esq., Fendall Building, Washington, D. C.

"GENTLEMEN: In accordance with the provisions of paragraph 24 of the law creating the Public Utilities Commission, D. C., you are directed to file with this Commission on or before January 23, 1914, a schedule showing all rates, tolls and charges which you have established and which are in force at this time for any service performed by you within the District of Columbia, or for any service in connection therewith, or performed by any public utility controlled or operated by you.

"You are further directed to submit as a supplement to the above a schedule showing all rates, tolls and charges established by you and in effect on March 4, 1913.

"The above schedules should be typewritten on letter-size paper and should be in duplicate.

"Respectfully,

(Signed) "J. L. SCHLEY,
"Executive Officer."

7. (*a*) That the plaintiff is advised by counsel and accordingly charges that all of the aforesaid proceedings by the defendants who constitute the Public Utilities Commission of the District of Columbia, were and are without jurisdiction on their part and therefore void; (*b*) that the said defendants were without jurisdiction to pass or enact the aforesaid Order No. 44 of January 3rd, 1914; (*c*) that the said defendants are without power, right or authority to take or exercise jurisdiction over the plaintiff, the Terminal Taxicab Company, Incorporated, for any purpose whatsoever, and especially for the purposes set out in the said Order No. 44 hereinbefore set forth; (*d*) that neither the Act of Congress of the United States approved March 4th, 1913, commonly known as, "The Public Utilities Act," nor Sections 8, 9, 10 and 11 thereof give or confer upon the said defendants any jurisdiction, power or authority over or with respect to the said plaintiff; (*e*) that the said plaintiff is not a common carrier as defined in Paragraph 1 of Section 8 of the aforesaid Act of Congress of March 4th, 1913; (*f*) that the said plaintiff is neither a corporation, street railway corporation, company, association, joint stock company or association, partnership or person, or their lessee, trustee or receiver appointed by any court whatsoever, owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of
Columbia for hire within the meaning of the said Paragraph
13 1 of Section 1 of the said Act of March 4th, 1913; (*g*) that the said plaintiff is not engaged in operating any agency for public use for the conveyance of persons or property within the District of Columbia for hire; (*h*) that the said plaintiff is engaged only in a private livery business and does not hold itself

out nor undertake to carry persons or property within the District of Columbia for hire, except by private agreement; (*i*) that the said plaintiff is not a so-called public utility within the meaning of the aforesaid Act of Congress approved March 4th, 1913.

8. That the plaintiff is engaged in a private business or commercial pursuit in keen competition with other concerns in the District of Columbia engaged in like business; that its methods of doing business, especially with respect to the economical and profitable administration thereof, are properly known only to its officers and its stockholders, and are no concern either of the public or of its competitors in business; that if the said Public Utilities Commission of the District of Columbia should be permitted to exercise jurisdiction over the plaintiff, the said Commission would compel the said plaintiff to file with the said Commission annual and other statements of its earnings and expenses, its methods of doing business and much other information which would be very valuable to the competitors of the plaintiff, which information the said Commission, in its annual reports to Congress, as provided by the said Act of Congress of March 4th, 1913, would be compelled to and would make public, to the great and irreparable loss and damage of the plaintiff; that if the said Commission is permitted to assume jurisdiction over the plaintiff, the said Commission will proceed to regulate the rates or charges which the plaintiff may make for its livery service and may arbitrarily lower such rates and charges, thereby depriving the plaintiff of proper, lawful and reasonable profits to which it is lawfully entitled, to the irreparable loss and damage of the plaintiff.

9. That Paragraph 85 of Section 8 of the said Act of Congress approved March 4th, 1913, provides a penalty of $200 for every violation of any provision of said Section 8 of the said Act and for every failure, neglect or refusal to obey any lawful requirement or order made by the said Commission, and the said plaintiff avers that these penalties are excessive and destructive, and their effect, if not their intent, is to deter the plaintiff from asserting its right to ignore the aforesaid unlawful and void order and any other unlawful and void orders of the aforesaid Commission, and that unless this Honorable Court shall enjoin the enforcement of any and all orders passed or which shall hereafter be passed by the said Public Utilities Commission and enjoin the exercise, by the said Public Utilities Commission, of any jurisdiction over this plaintiff, this plaintiff will be compelled to suffer such exorbitant and ruinous penalties as are provided by the Act, or comply with such unlawful and void orders of the said Public Utilities Commission to the great and irreparable loss, damage and injury of the said plaintiff.

10. That the plaintiff files this bill not only because it is without an adequate remedy at law to prevent the illegal acts hereinbefore set forth of the defendants, but especially of the defendants constituting the aforesaid Public Utilities Commission of the District of Columbia, and is therefore entitled to the aid of your Honorable Court sitting as a court of equity and exercising the general jurisdiction to equity appertaining, but also because it is

especially provided by Paragraph 64, Section 8, of the said Act of Congress creating the Public Utilities Commission of the District of Columbia, approved March 4th, 1913, that any public utility or corporation which is dissatisfied with any order or decision of the said Commission fixing any requirement, act or service upon the said public utility or corporation may commence a proceeding in equity in this Honorable Court against the said Commission as defendants to vacate, set aside or modify any such decision or order on the ground that the requirement, act or service complained of is unlawful or unreasonable. And the plaintiff avers that said Order numbered 44 is unlawful and that it is dissatisfied therewith.

11. And further the plaintiff files this bill under the provisions of Paragraph 65 of said Section 8, which provides that said proceeding in equity shall operate as an appeal or right of recourse to the courts to set aside, vacate or amend any order of the Commission, and in a proper case to enjoin the enforcement of such order and to prevent such order from becoming effective.

Prayers.

Wherefore the premises considered, the plaintiff prays:

1. That your Honors will grant unto the plaintiff the United States writ of subpœna to be directed to the said defendants by name, commanding them and each of them, etc.

2. That your Honors will grant unto the plaintiff the United States writ of subpœna to be directed to the said defendants and each of them, perpetually enjoinig them and each of them, and each of their servants, agents and attorneys, from doing any act, or taking any proceedings, or endeavoring to enforce any penalties to carry into effect the provisions of the said Act of Congress approved March 4th, 1913, either under the provisions of the said Act itself or under the provisions of any part or paragraph of Section 8 establishing the Public Utilities Commission of the District of Columbia, hereinbefore cited and quoted, approved March 4th, 1913.

3. That your Honors will vacate and set aside the aforesaid Order No. 44 of the Public Utilities Commission made by the defendants constituting the said Public Utilities Commission of the District of Columbia, and to hold the same to be unlawful and void.

4. That your Honors will grant unto the plaintiff an order of this Honorable Court temporarily restraining said defendants and each of them and each of their servants, agents and attorneys, pendente lite from exercising any jurisdiction over this plaintiff, and from doing any act or taking any proceedings or passing any orders or endeavoring to enforce any penalties to carry into effect the provisions of the said Act of Congress approved March 4th, 1913, or any of them.

15 5. That your Honors will grant unto the plaintiff such other and further relief as unto your Honors shall seem that the nature of the case shall require, and as unto your Honors shall seem meet.

TERMINAL TAXICAB COMPANY,
INCORPORATED,
By G. THOMAS DUNLOP, *Attorney.*

I, G. Thomas Dunlop, do solemnly swear that I have read the foregoing bill in equity and that I know the contents thereof, and that the same are true as stated in said bill; that I am the attorney of the plaintiff, the Terminal Taxicab Company, Incorporated, and as such attorney have authority to sign its corporate name to the said bill of complaint, and also to verify the same by this affidavit, and also to cause the corporate seal of the plaintiff to be affixed to the said bill of complaint.

G. THOMAS DUNLOP.

Subscribed and sworn to before me this 15" day of Jan. A. D. 1914.

J. R. YOUNG, *Cl'k,*
By F. E. CUNNINGHAM,
Ass't Cl'k.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

Rule to Show Cause.

Filed January 15, 1914.

* * * * * * *

Upon consideration of the bill and the exhibits therewith filed in this cause by the Terminal Taxicab Company, Incorporated, seeking to enjoin Chester Harding, Oliver P. Newman and Frederick L. Siddons, Commissioners of the District of Columbia, constituting as such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an alleged body corporate, from taking and exercising as such Public Utilities Commission any jurisdiction over the plaintiff, the Terminal Taxicab Company, Incorporated, and against enforcing any orders — the said Public Utilities Commission with respect to the said plaintiff, as well as from doing any act or taking any proceedings or endeavoring to enforce any penalties to carry into effect the provisions of the Act of Congress approved March 4th, 1913, commonly known as, "The Public Utilities Act," with respect to the said plaintiff, and also seeking to have all orders of the aforesaid Public Utilities Commission with respect to the said plaintiff vacated and set aside, as alleged and prayed in said bill, and on motion of the plaintiff by its attorney, it is this 15th day of January, 1914, ordered that the defendants aforesaid and each of them shall show cause on or before the 20th day
16 of January, 1914, at 10:00 o'clock A. M. why they should not be enjoined as prayed in said bill, provided a copy of this order be served upon them on or before the 16th day of January, 1914.

WENDELL P. STAFFORD, *Justice.*

Order Allowing Amendment to Bill, &c.

Filed January 27, 1914.

In the Supreme Court of the District of Columbia.

Equity. No. 32374.

TERMINAL TAXICAB CO.
vs.
PUB. UTILITIES COM. et al.

Equity. No. 32375.

FEDERAL TAXICAB CO.
v.
PUBLIC UTILITIES COM. et al.

Upon motion of def't the rule herein is continued until Feb. 16th 1914 with leave to the Terminal Taxicab Co. on motion of its counsel to file an amendment to its bill, and the time within which the defendants shall answer the original and amended bills herein is hereby extended to February 14th, 1914.

WENDELL P. STAFFORD, *Justice.*

Amended Bill of Complaint.

Filed January 27, 1914.

In the Supreme Court of the District of Columbia.

In Equity. No. 32374.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Plaintiff,
v.
CHESTER HARDING, OLIVER P. NEWMAN, and FDEDERICK L. Siddons, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate, Defendants.

The plaintiff by leave of Court first had and obtained amends its bill of complaint herein by adding to paragraph 6 at the foot of page 17, the following:

17 And this plaintiff is informed and believes, and therefore charges that while there are many individuals, firms and corporations engaged in automobile and other livery business in the District of Columbia, the character of whose business differs in no

way from that conducted by the plaintiff herein, and while the names and the character of the business of such concerns *is* well known to the said defendants, such concerns advertising their business in the local directory of the Chesapeake and Potomac Telephone Company and elsewhere, a copy of which current directory is herewith filed, marked, "Plaintiff's Exhibit H," and prayed to be taken as part hereof; and while there are numerous other persons, to wit, one hundred and fifty (150), owning, operating, controlling or managing automobiles and other conveyances for public use for the conveyance of persons or property within the District of Columbia for hire, including especially such persons as are engaged in operating what are commonly known as, "public hacks" or "taxicabs," and who are licensed by the District of Columbia for the express purpose of engaging in such public hack business upon the public streets and avenues of the District of Columbia, who are expressly required by Section 6 of Article 6 and otherwise of the Police Regulations of the District of Columbia, under a penalty for refusal, to carry all who shall apply, and although the names and the character of business of such persons *is* well known to the said defendants, such facts being contained in the official records in the offices of the Commissioners of the District of Columbia, (which records by reason of the obvious impossibility of reproducing them in this bill or attaching them hereto as an exhibit, are hereby referred to and prayed to be considered in connection herewith and as a part hereof), and although the character of business engaged in by all of the aforesaid persons, firms and corporations is such as would come within the letter, if not the spirit and contemplation of the provisions of the aforesaid Public Utilities Act of March 4th, 1913, nevertheless this complainant is informed and believes, and therefore charges that the defendants have failed to assume or to exercise any jurisdiction whatever over such individuals, firms and corporations, and have determined and decided not to assume or exercise, and have refused to assume or exercise any such jurisdiction, but on the contrary have arbitrarily, wrongfully, unjustifiably and unlawfully singled out and selected for the purposes of assuming and exercising jurisdiction thereover, only this plaintiff and three other concerns doing a similar private automobile livery business in the District of Columbia. And this plaintiff further is informed and therefore charges that the only concerns doing any manner of transportation business other than street railways over which the said defendants have assumed to exercise any jurisdiction are the following:

1. Semmes Motor Line, 628 Pa. Ave., S. E.
2. Metropolitan Coach Co., 1115 16th St., N. W.
3. Terminal Taxicab Co., 1225 20th St., N. W.
4. Federal Taxicab Co., 212 13th St., N. W.

18 5. Auto Livery Co., 212 13th St., N. W.

6. Barnett Taxicab Co., 209 11th St., N. W.
7. Herdic Cab Co., 1912 E St., N. W.
8. Metropolitan Auto Co., 628 Pa. Ave., S. E.

That of these that numbered 1 is an automobile omnibus line

running vehicles upon schedule from points within the District of Columbia to points in the State of Maryland, picking up passengers en route and admittedly engaged in the business of a common carrier for hire; that numbered 2 is similarly an automobile omnibus line operating entirely within the District of Columbia over the streets and avenues of the City of Washington on a prescribed route and schedules, having a special charter from the Congress of the United States and admittedly a common carrier of passengers for hire; that with respect to the concern numbered 7 above, this plaintiff has no knowledge except that it is engaged in a so-called horse livery business; with respect to the concern numbered 8 above, this plaintiff is advised that it is no longer in business.

And this plaintiff charges that the aforesaid acts and omissions on the part of the defendants, and all orders, rules and decisions of the said defendants, or any of them based thereon or in pursuance thereof, are unjustly discriminatory, unreasonable and void, and that if the aforesaid Act of Congress approved March 4th, 1913, is to be construed as requiring or permitting such discrimination or any discrimination between the plaintiff and the aforesaid persons, firms or corporations, or any other persons, firms or corporations, engaged in any similar business, then the aforesaid Act of Congress is unconstitutional and void, in that it undertakes to deprive the said plaintiff of its property without due process of law; that it takes the private property of the plaintiff for public use without just compensation, and that it denies to the plaintiff the equal protection of the laws of the United States, all in violation of the provisions of the Constitution of the United States.

TERMINAL TAXICAB COMPANY, INC.,
By G. THOMAS DUNLOP, *Attorney.*

G. THOMAS DUNLOP,
Attorney for Plaintiff.

I, G. Thomas Dunlop, do solemnly swear that I have read the foregoing amendment to the bill in equity and that I know the contents thereof, and that the same are true as stated in said amendment; that I am the attorney of the plaintiff, the Terminal Taxicab Company, Incorporated, and as such attorney have authority to sign its corporate name to the said amendment, and also to verify the same by this affidavit, and also to cause the corporate seal of the plaintiff to be affixed to the said amendment.

G. THOMAS DUNLOP.

Subscribed and sworn to before me this 27″ day of Jan. A. D. 1914.

J. R. YOUNG, *Clk.*
By F. E. CUNNINGHAM,
Ass't Clk.

19 *Answer.*

Filed February 26, 1914.

* * * * * * *

The Answer of the defendants herein to the bill of complaint herein exhibited, and the rule to show cause heretofore herein issued, respectfully shows to the Court as follows:

1. The defendants admit the allegations of Paragraph 1 of the said bill.

2. The defendants admit the allegations of Paragraph 2 of the said bill.

3. The defendants admit the allegations of Paragraph 3 of the said bill.

4. Answering Paragraph 4 of the said bill, these defendants admit the provisions of the charter of the Terminal Taxicab Company, as set forth.

The defendants neither admit nor deny the laws of Virginia, relating to the plaintiff, the same being matters of law.

These defendants admit that the said plaintiff is the owner and operator of a large number of automobile vehicles in the District of Columbia and elsewhere, but deny that its use of the same is private. They admit its main office as alleged, but deny it has a branch garage, as such on the premises of the Washington Terminal Company known as the Union Station, but aver that said alleged branch garage is a public stand occupied by the said plaintiff in the conduct of its business in the operation of an agency for public use for the conveyance of persons or property within the District of Columbia.

These defendants believe that the said plaintiff has contracts with certain hotels and other concerns to furnish certain services for guests and patrons, but den*ies* that such service is limited to guests and patrons of such hotels. These defendants believe that a considerable proportion of the plaintiff's business is done under an agreement with the Washington Terminal Company, but den*ies* that such business is private and aver*s* on the contrary that its business is essentially public and extends to that entire portion of the public which uses the Union Station for any purpose whatsoever, and that its business there is publicly conducted from a public stand.

Further, the defendants say they are not informed of what arrangements, if any, are made between proprietors of the various hotels and their guests and patrons for the service performed by the said plaintiff corporation, but they deny that all other business in automobile delivery service engaged in and performed by the plaintiff, is done at and through its general offices.

The defendants deny that plaintiff's business is limited as described in said paragraph, but on the contrary, the defendants aver that the plaintiff is and has for a long time been engaged in the

business of the public transportation of persons in the District of Columbia for hire.

20 Further, the defendants aver that prior to and since the 1st day of July, 1913, the plaintiff has been engaged in the business of a common carrier of passengers, and that prior to and since the said date, the plaintiff has been engaged in the business of owning, operating, controlling, and managing automobiles for public use for the conveyance of persons within the District of Columbia, for hire. They admit that prior to the said 1st day of July, 1913, the said plaintiff did own and operate certain licensed hacks for hire, and for which it paid the annual license fee required of public hacks, and that prior to said date, said plaintiff did offer for public hire upon the streets and public hack stands of this District the said vehicles.

The defendants admit that the said licenses expired on the 30th day of June, 1913, and were not renewed, but they deny that the public nature of the business conducted by the said plaintiff corporation was thereafter abandoned and has never since been resumed; but on the contrary the defendants aver that the said plaintiff corporation has engaged in the public transportation of persons since the said date, and was and is a common carrier of passengers within the meaning of the Public Utilities Law.

Further, the defendants say they have no knowledge of what the plaintiff's belief was as to the character of the business it conducted prior to the 1st day of July, 1913, and believe the same to be immaterial.

Further, the defendants admit that the said plaintiff corporation did notify them that it would discontinue such public hack business, abandon such public hack license as it had taken up, and cease to do business of a public character, or business upon the streets of the District of Columbia; but defendants aver that the said plaintiff still continues to conduct a business for public use for the conveyance of persons or property within the District of Columbia for hire.

The defendants admit that the character of the business done by the said plaintiff prior to the said 1st day of July, 1913, was as described, in the bill of complaint, and that such hiring was for the private and exclusive use of the person to whom such vehicle was let as further described in said paragraph.

The defendants do not know whether the plaintiff corporation in the conduct of its business has reserved the right to refuse service to any persons, and say that the same is immaterial.

The defendants admit that the vehicles of the plaintiff corporation are equipped with taximeters, and that the said plaintiff claims the right to fix its own rates or fares, but the same do not differ from public rates fixed by the Commissioners of the District of Columbia. The defendants also admit that the plaintiff has claimed that it has instructed its drivers and other employees orally and otherwise, not to accept business from persons on the public streets, or otherwise than at its garages, or from proprietors of hotels and other persons with whom it has special contracts; but the defendants say that the business of the plaintiff corporation is not conducted in ac-

cordance with said supposed instructions, but on the contrary
21 the defendants allege that the plaintiff corperation has and does transact the business of a common carrier for hire, within the meaning of the law.

The defendants deny that the plaintiff has not or does not hold itself out to the public as undertaking for hire to carry all persons indifferently who might apply, and they deny that it has never represented that its vehicles are engaged otherwise than by communicating with its garage, but defendants aver its practice and actual conduct of its business to be otherwise, as hereinafter set forth.

The defendants admit that the plaintiff is engaged in the business of storing for hire automobiles in its main garage and that it is also engaged in the business of repairing automobiles generally and the sale of accessories therefor, but say that such allegations are immaterial herein.

5. Answering paragraph 5 of the said bill, the defendants admit the letter of April 5, 1913, requiring said corporation to furnish a report. They admit the reply of the said Taxicab Company under date of April 12, 1913, and they also admit the other letters of communication referred to in the said paragraph.

Further, the defendants admit that the said hearing was had on July 14, 1913, as alleged, and that the said Taxicab Company was represented by counsel, as were other corporations in the said District, and arguments were presented to the said defendants upon the question of the jurisdiction of the said Utilities Commission over the plaintiff corporation, and other corporations within the said District, and another hearing was had on the 24th day of September, 1913, at which latter hearing considerable testimony was taken, for the purposes of informing the Commission of the nature of the business conducted by the said plaintiff corporation, and the said plaintiff was represented by counsel at the said hearing and participated therein. The defendants aver that the said hearings were open, public, and formal hearings, and that all persons interested were represented and participated therein, and that the same were valid and legal, and had for the purposes of informing the said Public Utilities Commission as to the facts relating to the manner in which the business of the plaintiff corporation was conducted. A copy of the proceedings at such hearing is filed herewith.

6. Answering paragraph 6 of the said bill, these defendants admit the matters of fact stated therein, and admit the correspondence and letters and orders, as alleged therein.

Further answering paragraph 6 of the bill of complaint as amended by that certain amendment thereto, filed in this court on the 27th day of January, 1914, the defendants say that said amendment is scandalous and impertinent in its nature, and should not be considered by this court, nor answered further by them than to deny that there are numerous other persons, to wit, one hundred and fifty (150), owning, operating, controlling, or managing automobiles or other conveyances for public use for the conveyance of persons or property within the District of Columbia for

hire, and by reason thereof, becoming common carriers as
22 defined in the Public Utilities Law, and to deny that its action in the performance of a public duty in assuming jurisdiction over the defendant in its endeavor to enforce this law, is discriminatory, unreasonable, or unjust. The defendants most respectfully direct the court's attention to the scandalous and impertinent charge made against them as public officers by the plaintiff in the said amendment, in which it charges that they have "arbitrarily, wrongfully, unjustifiably, and unlawfully" singled out and selected for the purposes of assuming and exercising jurisdiction thereover only this plaintiff and three other concerns doing a similar private automobile livery business in the District of Columbia, and the plaintiffs say that said charge is utterly untrue in fact and should find no place in these proceedings.

7. Answering paragraph 7 of the said bill, these defendants say (*a*) that the aforesaid proceedings and orders of the defendants are well within their jurisdiction, and are valid and binding.

(*b*) That the said defendants had the authority and power to promulgate the aforesaid order No. 24 of January 3, 1914.

(*c*) That the said Public Utilities Commission has power and authority to exercise its jurisdiction over the plaintiff, the said Terminal Taxicab Company, and to regulate the rates and conduct thereof, as other common carriers are regulated.

(*d*) That the Act of Congress approved March 4, 1913, "the Public Utilities Act," and the various sections thereof, confer ample authority upon the said defendants to exercise jurisdiction over the plaintiff as a common carrier.

(*e*) That the said plaintiff is a common carrier as defined in said Act.

(*f*) That the said plaintiff is a corporation owning, operating, controlling, and managing an agency for public use for the conveyance of persons within the District of Columbia for hire within the meaning of the said Act.

(*g*) That the said plaintiff is engaged in operating an agency for the conveyance of persons within the District of Columbia for hire.

(*h*) That the said plaintiff is engaged in a public livery business and does carry persons or property within the said District for hire, otherwise than by private agreement.

(*i*) That the said plaintiff is a public utility within the meaning of the aforesaid Act of Congress.

8. Answering paragraph 8 of the said bill for the purpose of the said rule, the defendants deny that the plaintiff is engaged exclusively in a private business; that whether its methods with respect to the economical and profitable administration thereof, are known to others, these defendants have no knowledge; that the publication of its affairs if made public, would be injurious to the said plaintiff, these defendants say is damnum absque injuria, and results from the public nature of the business conducted by said plaintiff for which it, and no one else, is to blame. The defendants admit further that the said Public Utilities Commission will, unless enjoined

by the Honorable Court, regulate the charges and rates of the
23 said plaintiff for the service which it performs of a public nature, and which may or may not result in the loss of profits to the plaintiff.

9. Answering paragraph 9 of the said bill for the purposes of the rule to show cause, these defendants say that the penalties provided by the said Act of Congress cannot be altered or changed by these defendants, and that if said penalties are incurred by the said plaintiff corporation, they will be incurred for the unlawful acts and doings of the said plaintiff and no one else, and these defendants further aver that they believe said penalties were provided to prevent useless and prolonged litigation over such matters as those included in the present proceedings.

10. Answering paragraph 10 of the said bill for the purposes of the said rule, the defendants admit the right of the plaintiff to file said bill herein under the law and to appeal to this Court for relief, if any, to which it may be entitled.

11. Answering paragraph 11 of the said bill for the purposes of the said rule, the defendants deny that said Paragraph 65 provides as set forth, but say that the same is a matter of law to be settled by the court after examining the law.

Answering generally, the defendants say that on July 14, 1913, pursuant to notice duly given, a public formal hearing was accorded the plaintiff and the other taxicab companies operating taxicabs in the District of Columbia to present facts and reasons to show that the Commission had not jurisdiction over them by the terms of the Public Utilities Law; that said hearings were conducted on July 14, and on September 24, and 29, 1913, and were attended by the plaintiff by its counsel, and other taxicab companies were also represented; that said hearings were occasioned by the failure of the plaintiff and other respondents to furnish certain information required by the Commission under Paragraph 94, of the Public Utilities Act and by the further reason that such information was declined to be furnished on the ground that the plaintiff and the other respondents at said hearing had claimed that they did not come within the jurisdiction of the Commission as they were not common carriers within the meaning of the law. That upon the opening of said hearing, the Chairman of the Public Utilities Commission called upon the plaintiff and stated that he would be very glad to hear from its representative as to why the plaintiff company corporation does not come within the meaning of the term, "common carrier" as defined in the Act; that thereupon counsel for the plaintiff made a long statement setting forth his reasons why he thought the plaintiff did not come within the terms of said Act, and thereafter witnesses were examined to ascertain such facts regarding the mode of operation of the plaintiff and other taxicab companies as would show whether they were or were not owning, operating, controlling, or managing any agency or agencies for the public use for the conveyance of persons or property within the District of Columbia for hire. That it appeared uncontradicted at said hearing that during a period of time lasting from July 22, 1913, to August

13, 1913, the agents of the Public Utilities Commission were able without the slightest difficulty, protest, or refusal on the part of the plaintiff to hire taxicabs of the plaintiff which were standing at the New Ebbitt and the Shoreham Hotels, although said
24 agents of the Commission approached them from a direction opposite said hotels; that only on two occasions out of many, were they refused, and then the drivers offered to telephone and get them accommodations. It also appeared that agents of the Commission stopped empty taxicabs of the plaintiff on the street, the driver of which offered to take them if they would wait until he could telephone to the garage. It further appeared from said hearing that no attempt was made to question any one who came out of or appeared to come from any of said hotels, and who desired to employ taxicabs, and that the drivers of said taxicabs of the plaintiff were not required to satisfy themselves as to whether the person so applying was or was not a guest or patron of the hotel. It further appeared that during the preceding year, the plaintiff's taxicabs had made over 203,000 trips in the city of Washington and that 40% of its business had been done over the telephone. It further appeared that under the contract of the plaintiff with said hotels a percentage of each fare carried was paid to the hotels and that said contracts were not a lease to the hotels of its taxicabs. It further appeared from said hearing and from the testimony of its officers, the said plaintiff made no discrimination between persons on account of race or color, with reference to extending its service. It further appeared from said hearings that all expenses of the Terminal taxicabs whether usually so-called hotel service, or so-called Union Station service, or so-called private service, were paid by the plaintiff; that the starter at the said hotels was paid by the plaintiff and the method of compensation of the driver of its taxicabs was a commission on the amount of business done by him. It further appeared that the plaintiff advertised conspicuously on the back of the local telephone directories, theatre programs, and otherwise, and the plaintiff could not justify its carriage of theatre patrons upon any other grounds than that they were licensees of the theatre even after the performance was over and as such had acquired rights not otherwise accorded to the citizens of the District of Columbia.

The defendants further aver upon information and belief that the plaintiff corporation has entered into contracts with certain hotels in the District of Columbia under the final operation of which it pays the persons or corporations operating said hotels large sums of money for the privilege of accommodating with taxicab service all persons who are guests of said hotel or who, as patrons thereof, may apply to it for accommodation, and that by virtue of its said contracts, it is enabled to monopolize a large part of the public space around said hotels to the exclusion of other corporations and individuals engaged in the business of operating automobiles and hacks for public use for the conveyance of persons or property within the District of Columbia for hire. The defendants further aver that the said contracts are simply a subterfuge under which the plaintiff is able to maintain this monopoly, and this otherwise illegal and unlaw-

ful occupation of public space and that its service is only nominally limited to the guests or patrons and that the word "patron" is by it so extended in its interpretation as to entitle any member of the public who has patronized said hotel in the remotest manner to command its service, and that method of its business is to serve a large
25 portion of the public under this guise in its endeavor to both monopolize public space and to avoid its obligations as a common carrier. The defendants further aver upon information and belief that the plaintiff pays to the said hotel a consideration for carrying its guests and patrons, for being permitted to occupy public space as aforesaid, and that no consideration whatsoever moves from the individual or corporation owning said hotel to the plaintiff for any service of any kind or character rendered by the plaintiff to such person or corporation. The defendants further aver that by reason of its contract or agreement with the Washington Terminal Company, the plaintiff carries indiscriminately all persons who use the Union Station without regard as to whether they are or are not passengers coming into or going from said Station on any of the railroads entering therein, and that the said contract or agreement is nothing more or less than another subterfuge under which it seeks transportation service.

Answering further these defendants say that the plaintiff by reason of other agreements with schools, theatres, turkish baths, mercantile establishments, and many other places where the public congregate, further endeavors to monopolize the transportation of the public and the occupation of public street space and succeeds in so doing. The defendants further aver that the taxicabs used by the plaintiff in its transportation of the public, as aforesaid, are handsome, expensive, and commodious vehicles, propelled by gasoline motors capable of great speed and power, and of the conveyance of persons and property with greater directness and expedition than any known safe means of transportation of this day. The defendants further aver that the general use of the telephone and its general installation over the District of Columbia both in private residences and in public pay stations, has rendered it easy, practicable, expedient, and possible for the plaintiff corporation to be in immediate connection through the telephone with almost the entire public of the District of Columbia, any one of whom can command its prompt and immediate service at all times. The defendants further aver that the plaintiff has heretofore and does now by means of large and conspicuous advertisements on the back of the local telephone directory in general use throughout the District of Columbia, and upon the programs of various theatres in the District of Columbia and otherwise, conspicuously hold itself out as a public carrier of passengers in the District of Columbia for hire; that it has invited the use of the telephone in the prosecution of its business by glaring red letter advertisements, occupying the entire back page of the telephone directory, and printed much more conspicuously than the notice for fire alarm calls and police calls and even more conspicuously than the name of the telephone directory on the front page of the same. The defendants further aver that the said adver-

tisement on the back of said telephone directory is nothing more or less than an invitation to the entire public to use its transportation and instrumentalities by commanding the same through the telephone service, and that nowhere in said public advertisement and holding out, is it indicated or suggested that its service is private or limited or confined to any class of individuals or to any portion of the public, but is addressed to, and is commanded by the public generally.

26 Answering further and generally, the defendants aver that every fact adduced at said hearing indicated it to be the fact, and the defendants aver that it is the fact, that the plaintiff herein conducts a business essentially public in its nature, and for the accommodation of the public; that its business is distinctly the operation of taxicabs for public use for the conveyance of persons or property within the District of Columbia for hire; that the taxicabs used by it in its said business are constructed primarily for the purpose of transporting persons for hire, and are not such vehicles as are usually used in a private livery service; that the character of their construction and the appearance of the vehicles themselves and the large monograms "TTC" placed upon the front, rear, and sides of said vehicles, indicate that they are public vehicles, and not private vehicles, and that they are engaged in a service of public accommodation to meet a public necessity.

The defendants aver that the character of the business done by the plaintiff corporation and the agencies and instrumentalities by it used in its operation of its said business in connection with the general use of the telephone to meet a public economic necessity for rapid urban passenger transportation, has rendered its business essentially public in its nature, and has so indelibly impressed it with a public use in the public mind that it has become a public utility, in many respects but little less important than the street railway and coach companies.

Having fully answered the bill of complaint herein exhibited, the defendants pray that said bill be dismissed, and that in the order dismissing the same, this Honorable Court will specifically set forth that the plaintiff corporations are subject to and within the jurisdiction of the Public Utilities Commission, in accordance with the terms of Section 8 of the Act of Congress approved March 4, 1913 (Public #435), and that the defendants be hence dismissed with their reasonable cost in *its* behalf expended.

CHESTER HARDING,
F. L. SIDDONS,
O. P. NEWMAN,
Public Utilities Commission.

CONRAD H. SYME,
Gen'l Counsel, Att'y.

DISTRICT OF COLUMBIA, *ss:*

Chester Harding, Oliver P. Newman, and Frederick L. Siddons, Commissioners of the District of Columbia, and constituting the Public Utilities Commission of the District of Columbia, say that

they have read the foregoing and annexed answer by them subscribed, and know the contents thereof, and the matters therein stated by them as to personal knowledge are true, and those stated on information and belief, they believe to be true.

CHESTER HARDING.
F. L. SIDDONS.
O. P. NEWMAN.

27 Subscribed and sworn to before me this twenty-fifth day of February, 1914.

[SEAL.] CARL A. MAPES,
Notary Public, D. C.

Final Decree.

Filed March 4, 1914.

* * * * * * *

This cause came on to be heard upon the bills of complaint as amended herein exhibited and the answers of the defendants thereto, and the evidence adduced herein, and the certified record of the proceedings heretofore held before the Public Utilities Commission of the District of Columbia, and was argued by counsel and the court being of opinion that the Public Utilities Commission had jurisdiction to enter the order complained of, and that the same was lawful and reasonable, it is this 4th day of March, 1914, adjudged, ordered, and decreed that the bill of complaint as amended herein exhibited be, and the same is hereby dismissd with costs to the defendants.

WENDELL P. STAFFORD, *Justice.*

Appeal noted in open court and bond for costs fixed at $100, which sum may be deposited in lieu of bond.

WENDELL P. STAFFORD, *Justice.*

Memoranda.

March 16, 1914.—Appeal bond approved and filed.
April 2, 1914.—Time for submission of statement of evidence and filing transcript of record in Court of Appeals extended to May 15, inclusive.

Docket Entries.

* * * * * * *

Date.		Proceedings.	
1914.		Deposit toward costs by Dunlop	
Jan.	15.	Bill, Appearance, Order to file, jurat and exhibits "A. B. C. D. E. F. and G.	filed
"	"	" Spa. to answer and Copy (4) issued (3 copies)	
"	"	Rule returnable Jan. 20" M. 94 P. 199 (1 copy)	"
"	20.	Order consolidating cause with Eq. 32375, and (1 copy) continuing hearing on rule to Jan'y 27-1914 M. 94 P. 211	"
"	"	Spa. to Answer returned served all	"
"	27.	Order allowing amendment of bill & continuing rule to Feb. 14-1914 (1 copy) M. 94 P. 219	
"	"	Amendment to Bill, Jurat & Exhibit (1) (Telephone Directory of Oct. 1913)	"
28			
Feb.	11.	Order continuing hearing on Rule till M'ch 3" M. 94 P. 246	"
"	26.	Answer of def'ts to Bill & Rule & Appearance of C. H. Syme	"
M'ch	3.	Testimony	"
"	4.	Final decree dismissing bill with costs; appeal noted M. 94 P. 283	"
"	16.	Bond of pl'ff for $100.—on appeal, approved. (Globe Ind. Co.)	"
"	23.	Add'l Deposit for Costs by Pl'ff	
Ap'l	2.	Order extending time M. 94 P. 369	"
May	5.	Assignment of Error by pl'ff	"
"	"	Designation of Record on appeal by pl'ff & Notice	"
"	8.	Agreed statement of evidence (Exhibits A & B.) signed by Stafford, J.	"

Assignments of Error.

Filed May 5, 1914.

* * * * * * *

The Court erred in dismissing the Original and Amended Bills for the following reasons:

(*a*) Because the defendants, constituting the Public Utilities Commission of the District of Columbia, were and are, as a matter of law, without jurisdiction to pass any order or to take any action affecting the plaintiff, as shown by the language of the Act of Congress of March 4th, 1913, establishing said Public Utilities Commission, apparent upon the face thereof.

(*b*) Because the defendants, constituting the Public Utilities Commission of the District of Columbia, were and are, as a matter of law, without jurisdiction to pass any order or to take any action affecting the plaintiff as established by bills, answer and proof herein.

(*c*) Because it was established by bills, answer and proof that the defendants so arbitrarily, unreasonably and with unjust discrimination have construed and attempted to enforce the provisions of the aforesaid Act of Congress, approved March 4th, 1913, against the plaintiff as that the said Act and any and all orders of the said Public Utilities Commission purporting to be in pursuance thereof should be held to be unconstitutional and void, as claimed in plaintiff's amended bill.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

Designation of Record on Appeal.

Filed May 5, 1914.

* * * * * * *

To the Clerk of the Supreme Court of the District of Columbia:

Please include the parts of the record hereinafter designated in the transcript for the Court of Appeals deemed sufficient by the appellant for a hearing thereof.

29 1. The Original Bill.

2. The Amended Bill of Complaint.

3. Rule to show cause.

4. The answer of the defendants to the original and amended bills and to the rule to show cause.

5. Agreed statement of evidence.

6. Decree of Mr. Justice Stafford, passed March 4th, 1914, dismissing Original and Amended Bills.

7. Notice of appeal and order fixing bond on appeal.

8. Memorandum of approval and filing of appeal bond for One Hundred (100) Dollars, 16 day of March 1914.

9. Order of April 2nd, 1914, extending time for making up record on appeal and filing transcript in Court of Appeals to May 15th, 1914.

10. Assignment of errors.

11. Docket entries.

12. This notice.

G. THOMAS DUNLOP,
Attorney for Plaintiff.

Conrad H. Syme, Esq., Corporation Counsel and General Counsel for the Public Utilities Commission of the District of Columbia.

DEAR SIR: Please take notice that I have designated as above the parts of the record which I desire included in the transcript on appeal to the Court of Appeals in this case.

Respectfully,
G. THOMAS DUNLOP,
Attorney for Plaintiff.

Memorandum.

May 8, 1914.—Statement of evidence signed and filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 55, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 32374 in Equity, wherein Terminal Taxicab Company, Incorporated, a body corporate, is Plaintiff and Chester Harding et al., Commissioners of the District of Columbia, &c., et al. are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of May, 1914.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

30 In the Supreme Court of the District of Columbia.

In Equity. No. 32374.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION et al., Defendants.

Agreed Statement of the Case.

The Terminal Taxicab Company is a corporation organized on the 13th day of May 1908 under the general incorporation laws of the State of Virginia, applicable to private business corporations. By Section 7 of its Certificate of Incorporation it is empowered to engage in the following classes of business, to wit:

"The purposes for which said corporation is formed are to manufacture, build, construct, operate, let for hire, buy, sell, deal in, and deal with taxicabs, locomobiles, automobiles, motor cycles, power boats, and vehicles of every kind, nature and description, whether propelled by horse or mechanical power.

To transfer, carry and transport by means of such taxicabs, locomobiles, automobiles, motor cycles, power boats, and vehicles of every kind, nature and description, whether propelled by horse or

mechanical power, passengers, goods, baggage, merchandise and other personal property of every kind, nature and description, from or to any points or places in the United States or elsewhere; but not to exercise any of the powers of a public service corporation."

On May 15th, 1908, it entered into a contract with the Washington Terminal Company, which Company owns, and operates the Union Railroad Station in Washington City, by the terms of which the Washington Terminal Company leased for a term of years to the Taxicab Company the right to occupy the west porch of its Union Station and certain other portions of its premises and the exclusive use of the same for the purpose of an establishment where automobiles should be kept for hire and for maintaining and operating therefrom a cab service and for office accommodations, etc., and granted also to the said Taxicab Company the exclusive right and privilege of soliciting livery and taxicab business from any and all persons passing through said Station to and from trains or otherwise patronizing the same. The said agreement and lease also provides that the Taxicab Company should provide a livery and taxicab service sufficient in the judgment of the Washington Terminal Company to accommodate persons using the said Station and operate the same in a manner in all respects satisfactory to and under the control and general supervision of the said Washington Terminal Company. It also provided that as a consideration for said lease and for said exclusive privileges, the Taxicab Company should
31 pay to the said Terminal Company a certain percentage of the gross receipts from said livery business.

Nothing either in this contract or in the conduct of the business under its terms prevents or limits the right of any individual, whether the driver of a public hack or of any other vehicle for hire, or of any private vehicle, from having free access to any part of the Union Station premises, including the west porch, for the purpose of delivering persons at the Station or for meeting such as have previously engaged them.

Thereupon and thereafter the Terminal Taxicab Company began operations and maintained and operated automobile vehicles known as taxicabs and touring cars for hire, not only at said Station but at and from its main garage and general offices, which at the time of the institution of these proceedings and for some time prior thereto, were located at 1231 20th Street, northwest; socalled taxicabs being automobile vehicles having attached thereto a mechanical device known as a taximeter which registers the distance traveled and indicates upon the face thereof the charges for the service as they accrue upon the basis of the distance travelled and the time occupied in waiting; so-called touring cars being automobiles not equipped with a taximeter, but hired by the hour or by the trip.

For a year or more subsequent to May 15th, 1908, no vehicles of the Terminal Taxicab Company were operated as licensed hacks under the provisions of the Police Regulations of the District of Columbia and the Act of Congress approved July 1st, 1902, known as the Personal Property and License Tax Law, Paragraph 11, Section 7, of which provides, "that proprietors or owners of hacks,

coaches, omnibuses, carriages, wagons, and other passenger vehicles for hire shall pay license taxes as follows: * * * autovehicles, automobiles, electromobiles, or other horseless vehicles by whatever name called, * * * nine dollars per annum. Licenses issued under this Section shall date from July 1st in each year. The driver of every licensed passenger vehicle, while transacting business as such driver, shall wear conspicuously upon his breast a badge numbered to correspond with the license of his vehicle. The badge shall be furnished by the District of Columbia and a tax of fifty cents shall be charged therefor in addition to the amount of the vehicle license."

But from about the month of May 1909 until the 30th day of June, 1913, the Terminal Taxicab Company licensed and operated some of its vehicles as public hacks and paid the license fee of nine dollars per annum per vehicle for such privilege.

Article IV of the Police Regulations of the District of Columbia applicable to such public hacks provides as follows:

Section 1. Every licensed vehicle for the conveyance of passengers shall be considered a hack within the meaning and intent of these regulations.

Section 2 (Paragraph *b*). The following are hereby designated as stands only for licensed motor drawn hacks carrying passengers (designating seven stands with the number of vehicles allowed on each).

32 Section 4. Any person who shall refuse to pay the legal fare for a hack, as described in these regulations, that he has hired shall on conviction thereof be compelled to pay to the driver of said hack an amount equal to the legal fare and also pay a fine of not less than one nor more than *than* five dollars. And in case any collateral required is forfeited, the amount of the legal fare shall be paid to the driver from such amount forfeited.

Section 7. It shall be unlawful for any person to solicit patronage for public hacks on the public streets or grounds, but the fact that such public cab or hack displays a device to indicate that such cab or hack is not engaged shall not of itself be considered as soliciting patronage.

Section 11. No person, firm or corporation having the possession, control, use or disposal of any automobile or other vehicle run or drawn by its own power, having a seating capacity for more than ten persons and used for the purpose of carrying passengers for hire, shall stop the same on any of the public spaces, streets, avenues or alleys in the District of Columbia, except at a public hack-stand, for a longer time than five minutes; or, while en route and for the purpose of discharging or receiving passengers, for a longer time than is reasonably necessary; Provided, That with the written permission of the Commissioners of the District of Columbia not more than two such vehicles may be kept standing at any one time in front of or adjacent to the offices or agencies of the owner, proprietor, person, firm or corporation, having the possession, control, use or disposal thereof where there is accommodation for waiting passengers, employees and other business appertaining thereto.

Section 13. Drivers and operators of public vehicles for hire shall promptly deliver to the Major and Superintendent of Police all property of value left in their vehicles by passengers.

Section 14. Every person as aforesaid violating any of the provisions of any section of this article wherein a penalty is not provided shall, on conviction, be punished by a fine of not less than one dollar nor more than forty dollars for each offense.

By an Act of Congress approved January 26th, 1887, the Commissioners of the District of Columbia were expressly authorized and empowered "to establish and regulate the charges to be made by owners of hacks and hackney carriages of any kind whatsoever."

Article VI, Section 1, of the said Police Regulations prescribes a schedule of charges as the legal taxicab rates in the District of Columbia.

Section 2 thereof provides that every hack, etc., shall have permanently fixed to the interior thereof cards upon which shall be printed the schedule of rates and the number of the driver's license and also that "each and every automobile not using taximeters occupying public space and offered for public hire, shall be authorized to charge" certain rates.

Section 3 provides that "each and every hack and every other vehicle described in this Article shall have the number of its
33 license plainly indicated on the outside glass of its lamps * * *. No hack, any part of which is broken, shall occupy any public hack stand. * * *"

Section 5. In case of disagreement between the driver and passenger of a public vehicle relative to the legal fare to be paid, the driver shall convey the passenger to the nearest Police Station * * *."

Section 6. If any driver, proprietor or lessee of a hack shall refuse to convey a passenger at the rates hereinbefore provided, or demand or receive an amount in excess of his legal fare, he shall be liable to the penalty provided in this Article."

Section 11. No owner, manager or person having control of any private vehicle of whatsoever kind shall exhibit or place or allow to be exhibited or placed thereon while such vehicle is on any public street, highway or place, any sign, notice, or advertisement of rates or charges for its use or hire, or of any charge to any person to be carried therein. Any person violating any of the provisions of this Section shall, on conviction thereof, be punished by a fine of not less than one dollar nor more than forty dollars.

Article 12, Section 11, provides that "every Public vehicle for the conveyance of passengers for hire shall display between one-half hour after sunset and one-half hour before sunrise, brightly lighted lamps so placed as to be plainly visible from the front, sides and rear thereof, for a distance of two hundred (200) feet and so as to plainly indicate its number at a distance of twenty feet.

On the 1st day of July, 1913, the Terminal Taxicab Company ceased to operate any of its vehicles as licensed public hacks, occupied no public hack-stands, discontinued the taking out of licenses

for its vehicles as public hacks and instructed its drivers neither to solicit nor accept any business either at public hack-stands or elsewhere on the public streets, and also by bulletin and verbally in-
— them as follows:

Terminal Taxicab Company.

June 25, 1913.

"All Agents and Drivers:

Beginning July 1, 1913, this Company will operate only private vehicles. Under this system all taxicabs and touring cars will be dispatched from the Main Garage, and all so-called "Pick-up" business will be discontinued.

JOHN J. BOOBAR, *Secretary.*"

Terminal Taxicab Company.

July 15, 1913.

All Drivers:

The cabs and touring cars of this Company are not public vehicles and are not licensed to do a public hack business.

The Company being a private livery, handles only such
34 business as it may cho-se to dispatch from its Garages, or business from the guests and patrons of such Hotels, Clubs, and other institutions as it is under contract to serve.

Drivers will be summarily dismissed for accepting or performing any other class of business.

JOHN J. BOOBAR, *Secretary.*

These bulletins were brought to the attention of all the drivers and all the agents of the Company. Two conferences were had with the drivers in the office of the General Manager, and they were told that the bulletins meant that beginning on July 1st, the Company had not renewed its licenses to do public hack business and that thereafter no so-called pick-ups would be allowed, and that only the business which was dispatched from the company's garages, or which came from the guests or patrons of the hotels or clubs would be accepted. Under no conditions were the drivers to accept any other business, and if they did accept such business, they would be summarily dismissed.

On two occasions subsequent to the issuance of these bulletins, drivers were discovered by the officials of the Company to have violated these instructions in that they had performed service for persons who had engaged them on the public streets. In each instance the driver was dismissed. (Pages 139-140.) In addition to these cases, it was testified by Captain Julian L. Schley, Executor Officer of the Public Utilities Commission, at one of the sessions of the hearings before that Commission on September 24, 1913, that on July 23, 1913, he approached a Terminal taxicab which was standing at the north entrance of the Ebbitt Hotel, being careful to approach it from the opposite side of the street from the hotel

and to enter the machine by the door away from the hotel. He requested the driver to take him to a certain address. The driver pulled up in front of the hotel and blew his horn, to which some one from the hotel responded and who handed the driver a piece of paper. He was then carried to the address desired and paid the amount on the register; and that again on July 30, 1913, at 5:20 P. M., which was immediately after the terrific storm which occurred on that day, he approached a Terminal taxicab standing at the east entrance to the Shoreham Hotel. He approached and entered the machine in the same manner as in the former case, and the service was performed for him; that again on August 2, 1913, he approached a Terminal taxicab standing at the north entrance to the Ebbitt Hotel; that he approached and entered the machine in the same manner as on the two previous occasions and directed the driver to take him to a certain address, which he did; that in neither one of these instances was he asked whether or not he was a guest of the hotel; that on July 26, 1913, he stopped a Terminal taxicab at the corner of 15th Street and New York Avenue and told the driver that he wanted to go to the Union Station. The driver refused to take him unless he would wait until he could go and telephone, which Captain Schley declined to do; that on August 2nd,
35 he stopped another taxicab of this same Company, which was running empty at 1st and F Streets, northwest, and asked the driver to take him to the Willard Hotel. The driver told him that he was not permitted to do it, unless he telephoned, which Captain Schley declined to do; that in neither of the instances when he engaged the cabs at the Hotels did he call the attention of the driver to the fact that he was not a guest of the hotel. In none of these instances was he hailed or accosted by the driver, and there were no "For Hire" signs upon the cabs. He did not notice any congestion of traffic or any obstruction to the streets at the various places where these taxicabs were located in the neighborhood of the hotels.

Mr. J. G. WILLIAMS, the Statistician of the Public Utilities Commission, testified that at the suggestion of Captain Schley, on August 4, 1913, he approached a Terminal taxicab standing in front of the F Street entrance to the Ebbitt Hotel. He was taken in and the driver went inside of the hotel and returned with a man, who asked Mr. Williams his destination and gave the driver a slip of paper. He was then taken to his destination. In this instance, the driver of the cab did not see him until he was right at the cab standing in the street. Again on August 13, 1913, he approached a Terminal taxicab standing in front of the F street entrance of the Ebbitt House, approaching it from the 14th Street side of the Hotel on the sidewalk. The driver moved up beside the entrance and sounded his horn several times, when a man with some kind of a uniform and cap came out and gave the driver a slip of paper. The driver announced the destination and started off. This driver in giving him change was ten cents short. Before getting out of the cab, he told the driver that he had hailed a moving cab on that block prior to taking his cab and asked the driver why he supposed the driver did not stop, to which the driver replied, "You know we are not sup-

posed to take anyone but the guests of the hotel, but I know you Mr. Williams. You are connected with the Steamboat Company and you are all right." He then said, "Mr. Williams I owe you some more money," and handed him the extra ten cents. The fact was that Mr. Williams had been connected with the Norfolk and Washington Steamboat Company, with which Company the Terminal Taxicab Company had a contract similar to the hotel and Union Station contracts. Mr. Williams also, testified that on August 13, 1913, he hailed two Terminal taxicabs, numbers 2202 and 2208, while they were moving west on Massachusetts Avenue at First Street, and that neither of them would carry him; that in neither instance in which he engaged cabs in front of the hotel was he asked whether or not he was a guest of the hotel, but in every case at the Ebbitt House, the cab driver awaited instructions from the starter at the hotel, who handed the driver some kind of a slip; that on no occasion was he ever able to get a Terminal Taxicab Company's vehicle on the streets, except the two instances to which he had testified at the Ebbitt House; that in no instance has his patronage ever been solicited by any driver for the Terminal Taxicab Company, either at a hotel or elsewhere; that whenever he has gotten a
36 cab of that Company, it has been at his own solicitation and not at the solicitation of the driver; that there was no indication that the cab was for hire to the public at all, no "For Hire" signs nor any other indication, and it was not offered to him; that the driver of the cab when asked why other cabs would not stop when he hailed them, had replied, "You know we are not allowed or supposed to carry anyone but guests of the hotel."

And the following testimony was given by JOHN J. BOOBAR, General Manager of the Terminal Taxicab Company:

"Mr. Stevens: What directions or orders did you give to your drivers or starters as to ascertaining whether a proposed passenger is a guest of a hotel?

Mr. Dunlop: You mean at the station?

Mr. Stevens: At a hotel.

Mr. Boobar: Just as I have heretofore stated in this bulletin that "Drivers will be summarily dismissed for handling any other business than from our garages or from the guests and patrons of such hotels, clubs and other institutions which we are under contract to serve."

Mr. Stevens: I understand that. What I am asking you is: What directions or orders do you give to your drivers to ascertain whether a person is a guest of a hotel?

Mr. Boobar: Why, in interpreting this bulletin to the drivers, as I previously stated, the drivers were instructed that they were—at these hotels they were to carry only the guests and patrons of the hotel, and were to use all means in their power to determine whether they were, and if they were not, they were not allowed to carry them.

Mr. Stevens: The latter part of that would mean that your drivers are to ascertain whether a proposed passenger is a guest of a hotel?

Mr. Boobar: I presume that if a passenger approached and came up in front of the Ebbitt House or any of the other hotels and wanted service, and made application for service, he would be asked as to whether he was a guest or not.

Mr. Stevens: But if they came up from the outside?

Mr. Boobar: Of course, if the drivers saw them coming out of the hotel they would probably ask no questions, but if a man came along the sidewalk and was to say, "I want to go to the Union Station," I think it is understood by all of our drivers that they are to absolutely, in every case, satisfy themselves that the party is the guest of a hotel.

Mr. Stevens: Do you know what the practice actually is, Mr. Boobar?

Mr. Boobar: The practice?

Mr. Stevens: I am asking you if you know what the practice actually is.

Mr. Boobar: I do not know, because I am not—well, while I am around the stands quite often and around these different places
37 quite often, of course I can expect the employees of the company to be on their good behavior when the manager is around.

Mr. Stevens: If I should go, for example, into the west entrance of the Ebbitt House, walk through into the lobby and direct your starter to order a taxicab for me, would I get it?

Mr. Boobar: You certainly would.

Mr. Stevens: You would assume, from the fact that I was in the hotel, I was a guest of the hotel?

Commissioner Siddons: A guest or patron.

Mr. Stevens: When you pick up passengers at the Union Station, I understand there is no restriction as within the District limits as to the place they may be carried?

Mr. Boobar. No restriction as to where they may be carried?

Mr. Stevens: Yes.

Mr. Boobar: We will take them wherever they want to go unless they want to go to a pest house, or something of that kind.

Mr. Stevens: I am not speaking of exceptions; I am speaking as to general principles.

Mr. Boobar: Yes.

Mr. Stevens: I think that is all.

Chairman Harding: There is one question that I want to ask the witness.

Is there any other restriction, other than the distinction you referred to a moment ago, as to the individual who uses the cab or applies for the use of a cab?

Mr. Boobar: Is there any question ever made?

Chairman Harding: Yes.

Mr. Boobar: Why, there certainly is. We get calls from some questionable localities where a cab is not dispatched, but they are usually handled in a diplomatic manner and we say we have no cabs.

Chairman Harding: Do you make any distinctions as to the individual applying?

Mr. Boobar: Yes. We refuse to carry, on some occasions, certain colored people.

Chairman Harding: Is that your general practice to decline to transport colored people?

Mr. Boobar: No, sir, that is not our general practice in regard to colored people. If the person is a respectable looking party and is responsible so that we know we are going to get our money after performing the service, we carry him."

"Commissioner Siddons: I observed that you said a little while ago that these instructions to drivers were given, and that they had to do with guests or patrons of the hotel.

Mr. Boobar: Yes, sir.

Commissioner Siddons: I want to ask you this question: Supposing a man goes from the street into the bar at the Ebbitt House, gets a drink and comes out and then asks for a taxicab—one of your cabs: Is he to be accommodated under your theory of the 38 rule? He is within the rule of contract or of law, as the case may be? He is a guest sufficiently for that purpose?

Mr. Boobar: That is my idea, that he is a guest or patron of the hotel."

In view of this testimony, the Terminal Taxicab Company on October 2nd, 1913, issued to all of its agents and drivers the following bulletin:—

Terminal Taxicab Company.

Bulletin No. 375.

Oct. 2, 1913.

All agents and drivers:

All agents must understand that vehicles detailed for service at the various hotels are for the use of guests or patrons of such hotels only. A patron is understood to be any person who patronizes any of the various departments of the hotel's business. A guest is understood to be anyone who accepts the hospitality of the hotel.

Such vehicles must therefore be hired only to such persons as engage them in the hotels. Under no circumstances must any such business be transacted outside of the hotel unless the party desiring service is known by the agent to be at the time a guest or patron of the hotel.

All service checks covering business at these places must bear a signed certificate on the back thereof that the service is for a guest or patron of the hotel. If the agent has personal knowledge that the service is for a guest or patron, such agent may sign the certificate himself, but he will be held personally responsible in such cases. Where the agent has any doubt in the matter he must require the certificate to be signed by the guest *of* patron.

Drivers are not allowed to perform service unless service check bears this certificate.

JOHN J. BOOBAR, *Secretary.*

J. J. B./S.

Since which time all cabs of the Terminal Taxicab Company while standing on the streets adjacent to and in the service of the hotels have conspicuously placed upon them a card bearing the following inscription:—

"For guests and patrons of this hotel only," a facsimile of which is hereto attached, *marked*, "Exhibit T. T. Co. No. 2," and in accordance with said bulletin, all service checks for services performed by cabs at the various hotels, bear the signed certificate as provided in the bulletin. Cards like the one hereto attached, marked, "Plaintiff's Exhibit B," are also kept in all of the vehicles of the Terminal Taxicab Company.

The Terminal Taxicab Company, has continuously and does now operate its business under the provisions of Paragraph 13 of said license tax law, which provides, "That proprietors or owners of establishments where auto vehicles of any pattern or description, or motor power whatsoever are kept for hire or are kept stored for
39 others for profit or gain shall pay a license tax of twenty-five dollars per annum for ten vehicles or less and two dollars additional for each vehicle in addition to ten: Provided, That nothing in this paragraph shall be so construed as to exempt the owner of any vehicle using the public stands from paying the additional license tax provided in Paragraph 11 of this Section."

The Terminal Taxicab Company has annually obtained the necessary licenses and paid the necessary taxes therefor under the provisions of the said Paragraph 13.

In so conducting its business, the Terminal Taxicab Company lets its vehicles to such as hire them for the exclusive and private use of the customer or patron. In every such instance and so long as the vehicle is in the service of the person hiring it, the complete control and exclusive use of such vehicle is under the sole direction of such person. He has the right to direct the destination of such vehicle at his pleasure; to occupy it alone or accompanied by his guests or not, according to his choice, and for any length of time; to exclude from such vehicle any and every other person, whether there be room in the vehicle for others or not; and to use the vehicle while so hired and in his service precisely as though it were his private property.

The Terminal Taxicab Company is in competition with many other automobile livery concerns in the City of Washington, and in the conduct of its business is very often compelled to meet competitive rates. Many of its charges are made and determined by the special character of the business to be performed; such rates being made with the customer by special agreement and depending upon the various factors entering into the service, such as the amount of dead mileage, the distance to be run, the time which will be probably occupied in waiting, the number of passengers to be carried, the length of time the service will occupy,

the character of the roads over which the car will travel, the kind of car the patron desires, and, in many instances, such as conventions, tours and other parties requiring a number of cars or involving a large amount of business, special arrangements and rates are made. Where the charge is made solely upon the basis of the distance travelled and without special arrangement, the rate is determined by the taximeter, at least with respect to such cars of the Company as are equipped with such devices. The cars of the Company can also be hired by the hour at rates quoted upon application to its garage. They can also be hired at a flat rate covering a particular service, such as attendance upon receptions, dances, dinners, theatres, etc., quoted also by like application to the garage. Its vehicles are also often hired to parties or persons at so much per head for a particular service. The Company claims to run its business on the same principal as a private livery. It does not undertake to carry anybody who does not apply at its place of business for carriage by telephone or otherwise, except such as come within its contracts with the Washington Terminal Company and the hotels, department stores, theatres, etc., with which it has contracts as hereinbefore set forth. It does not undertake and constantly refuses to carry people who apply on the public streets. It refuses service to people about whom it has any doubt as to whether they would pay after the service was
40 rendered, and claims the right to refuse to carry for any reason whatsoever. While there have been cases where people have demanded accommodation and have been refused, there has never been a case where such persons have ever sought to compel the performance of the service on the theory that the Terminal Taxicab Company was a common carrier or otherwise.

The Terminal Taxicab Company extends credit to such of its customers as appear from reports of commercial agencies and otherwise to have a good credit rating and to such it issues identification cards which the customer may exhibit to the driver who will thereupon permit him to sign the service check, having the service charged to his account, in lieu of paying cash.

The drivers are also given discretion to refuse service to anyone when in their judgment it appears likely that such person would be either unable or unwilling to pay the charge when the service had been rendered.

The Terminal Taxicab Company advertises it- business conspecuously on the back of the local telephone directory in the following form:—

Terminal
Taxicabs

Telephone
North
1212

Private storage. GARAGE. Gasoline and electric cars.

Expert Repair Work.

1231 Twentieth Street N. W.

It also advertises in theatre programs, in the newspapers and elsewhere, setting out the excellence of its service and featuring the fact that its vehicles may be obtained by telephoning to its garage, the telephone number of which is North 1212. It makes every effort to extend its business and particularly by encouraging the use of the telephone to its garages, for securing its service. It operates about seventy-five automobiles, including touring cars, so-called taxicabs and limousines, the latter being handsome closed cars with no taximeter attached and which are used principally for fashionable receptions and other entertainments. The Company maintains its own repair shops in which they have occasionally built cars, and in which they do repair work for owners of private cars. At its garage, it also stores cars for private owners for which it is paid rates fixed by it for such service. This latter is a large part of its business. By the rules and regulations of the Company, its drivers are not permitted to solicit business upon the public streets, nor to perform any service that is not arranged for either at its garage at 1231 20th street, northwest, or its garage upon the property of the Washington Terminal Company directly or by telephone, or
41 at one of the hotels with which the Company has contracts to furnish livery service for the guests and patrons of such hotel.

By such contracts the Taxicab Company undertakes to furnish to the hotel for a definite period, automobile livery service by means of taxicabs and touring cars for the use of the hotel its guests and patrons; to maintain on the premises of the hotel an agent or starter for the dispatching and proper management of such livery service, which agent is to be uniformed in a manner satisfactory to the hotel; to maintain telephone service between the hotel and its garage; to conduct the said livery service in a proper and efficient manner and supply a sufficient number of vehicles within certain specified hours to reasonably meet the needs of the hotel; and that such service shall be performed at the rates and upon the conditions prescribed in a schedule issued by the Taxicab Company, copy of which is hereto attached marked, "Plaintiff's Exhibit B" which was also so filed with and designated in the Original Bill, with the exception of certain special rates specified in the contract, and the

hotel on its part undertakes not to permit anyone other than the Taxicab Company to solicit any business in or about the hotel, nor to stand any vehicle thereat in such manner as to interfere with the proper and efficient conduct of the service to be performed by the Taxicab Company; that it will pay to the Taxicab Company a certain percentage of such charges for livery service performed by the Taxicab Company as the hotel shall collect from or charge to its guests and patrons; that the Taxicab Company may retain a certain percentage of such fares and charges paid to it by the guests and patrons of such hotel in cash. It is also stipulated in the contract that questions in dispute between the guests of the hotel and the Taxicab Company shall be adjusted and determined by the hotel.

During the fiscal year of the Terminal Taxicab Company ending April 30, 1913, there were performed by the vehicles of the Company 203,000 service trips, 1,400 of which were performed by cabs having a public hack license, which were engaged by persons upon the public streets in accordance with the Police Regulations governing such public hacks. Thirty-five per cent of the total trips performed by the vehicles of the Company originated at its garage at the Union Station; forty per cent originated at its main garage at 1231 20th Street, northwest, practically all of which was arranged for by telephone; and twenty-five per cent originated at the various hotels with which the Company had contracts for supplying livery service. The public hack business was abandoned because it was relatively insignificant in amount, and because it was performed at a financial loss.

On the 4th day of March, 1913, Congress enacted a law creating the Public Utilities Commission of the District of Columbia, conferring upon such Commission jurisdiction over certain so-called public utilities in the District of Columbia for the purpose of regulation and otherwise, as provided by the Act. By the definitions prescribed in that Act, the term "public utility" was defined to mean and embrace every street railroad, street railroad corporation, common carrier, gas plant, gas corporation, electric plant, electrical corporation, water power company, telephone corporation,
42 telephone line, telegraph corporation, telegraph line and pipe line company, and the term "common carrier," when used therein was defined so as to include express companies and every corporation, street railroad corporation, company, association, joint stock company or association, partnership, and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire.

On the 5th day of April, 1913, the said Public Utilities Commission notified the Terminal Taxicab Company of a certain order of the said Commission which required that the said Taxicab Company, as a public utility operating in the District of Columbia, should make certain reports to the said Commission, and the Terminal Taxicab Company thereupon on April 16, 1913, addressed to said Commission a letter denying the jurisdiction of

the said Commission over it, claiming not to be a public utility operating in the District of Columbia, or a common carrier within the meaning of the said Act and notifying the said Commission that the said Taxicab Company would discontinue operating any of its vehicles as public hacks, abandon such public hack licenses as it had taken out and cease to do any business of a public character or business upon the streets of the District of Columbia. On the 3rd day of July, 1913, the said Commission notified the said Taxicab Company that it would hold a public hearing on July 14th, 1913, for the purpose of determining its jurisdiction over the plaintiff and others questioning its jurisdiction. Successive hearings were accordingly had on the 14th of July, 1913; September 24th, 1913; and September 29th, 1913, at which hearings the said Public Utilities Commission heard testimony and argument, and at which hearings the said Taxicab Company appeared specially by its counsel, reserving the right to contest the jurisdiction of the Commission and under protest submitted certain evidence as to the character, nature and extent of the business conducted by it. In addition to the facts hereinbefore stated, such evidence was substantially as follows:

JOHN F. DAVIS gave testimony tending to show that he is the owner and driver of a licensed public automobile hack in the District of Columbia; that as such he solicits and performs business on the public hack stands and public streets of the city; that he is not permitted either by the Police Regulations of the City, or by the Police force of the city, to solicit business or to stand his vehicle on the streets adjacent to any of the hotels, but that he endeavored whenever possible to secure business at such hotels and to stand his vehicle at such places other than public hack stands, although he knew it to be in violation of law and of the Police Regulations. He also testified that on one occasion, September 26, 1913, he had seen the Assistant District attorney Mr. Sydney Mudd "and that he knows he is not a guest of the Ebbitt," approach one of the drivers of a touring car belonging to the Terminal Taxicab Company at the Ebbitt House; that Mr. Mudd ar-
43 gued with the driver fully twenty minutes before the driver allowed Mr. Mudd to get into the car; that Mr. Mudd then got into the car and went down F Street; that he did not hear the conversation between Mr. Mudd and the driver; that he saw Mr. Mudd come from Losekam's, which is across the street from the hotel; that he did not know whether Mr. Mudd told the driver he was a guest of the hotel or not, but that he (Davis) knew that Mr. Mudd was not a guest; that when the vehicle returned he (Davis) was at the corner of 13th and E Streets; and that he hailed the driver and said to him, "Are you for hire?"; that the driver said, "Yes;" that he (Davis) then said to his companion, "Come on Jake, Let's get in;" that the driver then said, "You are a fine fellow, ain't you? You thought you had something on me;" that the driver then pulled off before he (Davis) could get to his cab. He also testified that he had been pretty much alert, incidentally, to find out something about the drivers for the Terminal Taxicab Company taking people on the streets; that is what he was out there for.

J. W. BEVANS testified that on a certain date shortly before the hearing, he, in company with three companions, walked up F Street between 13th and 14th Streets on the north side, crossed over to the hotel and hired a machine to go to the baseball park. One of the gentlemen was from New York; that they went from the Ebbitt to the Willard Hotel, where one of the gentlemen, who was stopping at the Willard Hotel, got his hand bag. From there they went to the baseball park. The gentleman who hired the cab was a guest of the Willard Hotel; that he did not know whether the driver of the cab saw them as they approached it; that they stood on the corner for some little time waiting for one of the party before the machine was engaged; that no questions were asked any one of the party as to whether or not there was a guest of the hotel in the party. He also testified that on previous occasions, not within the last year, he had also engaged cabs at the Ebbitt House to take his children to the Circus.

CHARLES C. FROST, called by counsel representing the Association of Public Hack Owners, testified that owners of automobiles and taxicabs other than the Terminal Taxicab Company and the Federal Taxicab Company (the two companies who question the jurisdiction of the Public Utilities Commission) stand their vehicles in front of several of the minor hotels of the city, such as the Metropolitan, the National, the St. James, the Sterling and the Howard House, and that they have the privilege of serving such hotels, and that at such places any one could go up on the street and hire a cab, whether such person happened to be a guest of the hotel or not; that he had made no investigation with respect to the Terminal Taxicab Company.

Thereafter the Public Utilities Commission decided that the Terminal Company, among certain others, concerning which similar hearings and investigations had been had, was engaged in
44 the business of a common carrier within the meaning of the Public Utilities Act and was therefore within the jurisdiction of the Public Utilities Commission, and the said Commission set forth said decision by the following order:

"Public Utilities Commission of the District of Columbia.

"Order No. 44.

"January 3, 1914.

"P. C. No. 7.

"In the Matter of the Jurisdiction of the Commission Over The Terminal Taxicab Company, The Federal Taxicab Company, The Merchants Transfer & Storage Company, and The Blue Line Transfer Company.

"The Commission has before it for consideration the question of its jurisdiction over the following corporations engaged in the business of transportation within the District of Columbia:

"The Terminal Taxicab Company,
"The Federal Taxicab Company,
"The Merchants Transfer & Storage Company,
"The Blue Line Transfer Company.

"The history of these cases is as follows: In reply to a circular letter sent by the Commission on April 12, 1913, calling for certain information required by the Public Utilities Act to be [SEAL.] furnished the Commission, these companies declined to furnish the information on the ground that they were not common carriers and not under the jurisdiction of the Commission.

"Following the receipt of their communications declining to furnish the information, the Commission held public hearings in the matter on Monday, July 14, 1913, Wednesday, September 24, 1913, and Monday, September 29, 1913. At these hearings the companies were represented by their officers and counsel and their statements and arguments together with the testimony submitted in the case are of record in the files of the Commission.

"In view of all of the facts developed, the Commission decides:

"1. That the Terminal Taxicab Company and the Federal Taxicab Company are engaged in the business of common carriers within the meaning of the Public Utilities Act, and therefore are within the jurisdiction of the Public Utilities Commission.

"2. That the Blue Line Transfer Company is not within its jurisdiction.

"3. That the Merchants Transfer and Storage Company is not a common carrier as contemplated by the Public Utilities Act, and therefore that that Company does not come within its jurisdiction.

"In view of the foregoing it is

Ordered:

"That the Terminal Taxicab Company and the Federal Taxicab Company, within ten days after the receipt of this order, shall
45 furnish to the Commission the information originally called for in their circular letter of April 12, 1913.

"A true copy:

[SEAL.] (Signed) "J. L. SCHLEY,
"Executive Officer."

"File (2).
Companies.
Bulletin Board.
Press."

Thereupon and thereafter the plaintiff on the 9th day of January, 1914, filed with the said Public Utilities Commission a notice of the plaintiff's dissatisfaction with said order and decision and of its intention to commence proceedings in equity in the Supreme Court of the District of Columbia against the defendants to vacate and set aside said order.

Thereupon and thereafter the Terminal Taxicab Company brought these proceedings by original and amended bills filed in the Supreme Court of the District of Columbia, as provided by the terms

of the so-called Public Utilities Act hereinbefore referred to, seeking to set aside the aforesaid order and to have the said Public Utilities Commission declared to be without jurisdiction over this plaintiff.

There was also offered in evidence at the hearing upon the original and amended bills in the Supreme Court of the District of Columbia, the names of approximately 150 persons who own and operate automobile and horse-drawn vehicles as public hacks and taxicabs in the District of Columbia under the provisions of the Police Regulations and of law applicable to such business as hereinbefore set forth. There was also offered in evidence a list of 33 individuals, corporations and partnership concerns, owning and operating automobile livery service for hire in the District of Columbia, the names and addresses of which are to be found in the local telephone directory, and a number of which otherwise advertise their business in such directory and elsewhere. There was also offered in evidence a list of 95 persons owning and operating horse livery businesses in the District of Columbia. All of such automobile and horse livery owners and concerns pay license taxes and secure licenses to conduct such livery stable and garage businesses under the terms of Paragraph- 12 and 13 of the license tax law hereinbefore set forth; such licenses being issued by the Commissioners of the District of Columbia.

It was also conceded that the Public Utilities Commission has undertaken to assume jurisdiction over the following concerns only—

Semmes Motor Line, 628 Pa. Ave. S. E.
Metropolitan Coach Co., 1115 15th St. N. W.
Terminal Taxicab Co., 1229 20th St. N. W.
Federal Taxicab Co., 212 13th St. N. W.
Auto Livery Co., 212 13th St. N. W.
Barnett Taxicab Co., 209 11th St. N. W.
Herdic Cab Co., 1912 E St. N. W.
46 Metropolitan Auto Co., 628 Pa. Ave. S. E.

It was also conceded that the Semmes Motor Line and the Metropolitan Coach Company are automobile omnibus lines operating over a prescribed route and taking up passengers on the way wherever such passengers would meet the vehicles, and were concededly common carriers of passengers; that the Metropolitan Auto Company, mentioned in said list, is defunct and out of business.

It was also conceded that the Public Utilities Commission had not assumed jurisdiction over these public hackmen and automobile livery concerns, other than those mentioned in the above list, for the reason that the Commission did not consider that they did business sufficiently large in volume to come within the meaning of the Public Utilities Act as construed by said Commission and that said Commission does not intend to exercise jurisdiction over such concerns.

It is stipulated between counsel that the contracts between the appellant and certain hotel companies which were placed in evidence and all other exhibits filed or used at either the hearing before the Public Utilities Commission or before the Supreme Court of the District of Columbia, may be used at the argument of this

cause in the Court of Appeals or elsewhere, as though the same had been set forth in full in this statement.

G. THOMAS DUNLOP,
Attorney for Terminal Taxicab Company.
CONRAD H. SYME,
General Counsel Public Utilities Commission and Corporation Counsel.

And thereupon counsel for the plaintiff prayed the Court to sign this, its statement of evidence, which is signed in duplicate by counsel for the respective parties hereto and submitted as an agreed statement of the case, embracing all of the evidence in the cause, which is accordingly done in duplicate by the Court nunc pro tunc this 8th day of May, 1914.

WENDELL P. STAFFORD, *Justice.*

[Endorsed:] In Equity. No. 32374. Terminal Taxicab Company v. Public Utilities Commission et al. Agreed Statement of the Case. G. Thomas Dunlop, Attorney & Counsellor at Law, Washington, D. C.

47 EXHIBIT T. T. Co. No. 2.

FOR GUESTS AND
PATRONS OF
THIS HOTEL ONLY

48 "PLAINTIFF'S EXHIBIT B."

THIS IS NOT A PUBLIC HACK

TERMINAL TAXICAB COMPANY

TELEPHONE NORTH 1212

NOTICE

No vehicle of the Terminal Taxicab Company is, or will be, hired except upon the following conditions, to which every user thereof is understood fully to agree at the time of hiring, viz.:

1. They are strictly private and not public carriages.

2. They are and will be hired only by special agreement with and to such persons, and upon such terms, as shall be approved by an authorized agent of said Company, and the Company reserves the right to refuse service to any person whomsoever, at its pleasure.

3. The Company reserves the right to determine in each instance whether it will or will not engage for the particular service.

4. Except where different rates shall be expressly agreed upon, or fixed by the Company prior to rendering service, the rates noted on reverse side of this card will apply.

The Terminal Taxicab Company does NOT hold itself out to be a Common Carrier nor a Public Carrier of Passengers.

49

THIS IS NOT A PUBLIC HACK

48 "PLAINTIFF'S EXHIBIT B."

RATES EFFECTIVE JULY 1, 1913

TAXICAB RATES; 1 TO 5 PERSONS

For the first half mile or fraction thereof..... 50c
Each quarter mile thereafter..... 10c
Each four minutes waiting time..... 10c
Rate per mile or fraction thereof for cabs traveling empty outside of the following boundary 20c

M St. and Aqueduct Bridge; W. & O. D. Ry. Station; Georgetown University; 35th and R Sts.; Massachusetts Ave. and 30th St.; Cathedral and Connecticut Aves.; Park and Adams Mill Roads; Park Road and 16th St.; Park Road and Sherman Ave.; Michigan Ave. and North Capitol St.; 4th and T Sts., N. E.; Maryland and Florida Aves., N. E.; 14th St. and South Carolina Ave., S. E.; 9th St. and Pennsylvania Ave., S. E.; 9th and M Sts., S. E.; and all points in South Washington.

Carrying small trunk or hand bag, in charge of driver, each..... 20c
No charge for hand bags or suit cases carried inside cab, not more than two to each passenger, nor for children under 7 years of age. Additional baggage (or such as is in charge of driver) each piece..... 20c

CAB RATES—HOURLY (Not more than 5 passengers)

For the first hour..... $4.00
Each succeeding hour or fraction thereof... 3.00

TOURING CARS—HOURLY RATES

Not more than four passengers, per hour... $4.00
(5-Passenger Car)
Not more than six passengers, per hour... $5.00
(7-Passenger Car)

Special rates for round trip service to theatres, balls, banquets, receptions, etc.; and for cab and touring car service by the day, week, or month, furnished on application.

For the protection of our patrons we have our taximeters inspected and sealed by the Department of Weights, Measures and Markets for the District of Columbia.

The Terminal Taxicab Company does NOT hold itself out to be a Common Carrier, nor a Public Carrier of Passengers.

50 THIS IS NOT A PUBLIC HACK

Endorsed on cover: District of Columbia Supreme Court. No. 2691. Terminal Taxicab Co., &c., appellant, vs. Chester Harding et al. Court of Appeals, District of Columbia. Filed May 14, 1914. Henry W. Hodges, clerk.

51 WEDNESDAY, November 4th, A. D. 1914.

No. 2691.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Appellant,

vs.

CHESTER HARDING, OLIVER P. NEWMAN, and FREDERICK L. SIDDONS, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate.

The argument in the above entitled cause was commenced by Mr. G. Thomas Dunlop, attorney for the appellant.

52 THURSDAY, November 5th, A. D. 1914.

No. 2691.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Appellant,

vs.

CHESTER HARDING, OLIVER P. NEWMAN, and FREDERICK L. SIDDONS, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate.

The argument in the above entitled cause was continued by Mr. G. Thos. Dunlop, attorney for the appellant, and was concluded by Mr. C. H. Syme, attorney for the appellees.

53 In the Court of Appeals of the District of Columbia.

No. 2691.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Appellant,

vs.

CHESTER HARDING, OLIVER P. NEWMAN, and FREDERICK L. SIDDONS, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate, Appellees.

Opinion.

(Mr. Justice Robb delivered the opinion of the Court.)

This appeal is from a decree in the Supreme Court of the District dismissing appellant's bill against the Public Utilities Commission

of the District to restrain that Commission from assuming jurisdiction over the appellant as a public utility under Sec. 8 of the Act of March 4, 1913, 37 Stat. 974. The term "Public utility," as used in that section, embraces "every street railroad corporation, common carrier, gas plant, gas corporation, electric plant, electrical corporation, water power company, telephone corporation, telephone line, telegraph corporation, telegraph line, and pipe line company." The term "common carrier," is declared to include "express companies, and every corporation, street railroad corporation, company, association, joint stock company or association, partnership, and persons, their lessees, trustees or receivers appointed by any court whatsoever owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire."

54 From the agreed statement of the case the following facts appear: The Taxicab Company, although located and doing business in the District of Columbia, was incorporated under the laws of the State of Virginia. By the terms of its charter it is authorized "to transfer, carry, and transport by means of such taxicabs, locomobiles, motorcycles, power boats, and vehicles of every kind, nature and description, whether propelled by horse or mechanical power, passengers, goods, baggage, merchandise, and other personal property of every kind, nature and description, from or to any points or places in the United States or elsewhere; but not to exercise any of the powers of a public service corporation." The company operates about seventy-five automobiles, including taxicabs, touring cars and limousines. It maintains its own repair shops, in which it occasionally builds cars. It is under contract with the Washington Terminal Company, which owns and operates the Union Railroad Station, and by the terms of that contract the Terminal Company has leased for a term of years to the Taxicab Company the right to occupy certain portions of the Union Station for the purpose of maintaining an establishment, including office accommodations, where automobiles are kept for hire and of operating therefrom a cab service. The Taxicab Company also has the exclusive right and privilege of soliciting livery and taxicab business from any and all persons passing through said Station to and from trains or otherwise patronizing the same, and must provide a service sufficient in the judgment of the Terminal Company to accommodate all persons using such Station. In consideration for such lease and privilege, the Taxicab Company pays to the Terminal Company a percentage of its gross receipts from such business.

The Taxicab Company also is under contract with several of the hotels of the City to furnish livery service for the guests of those hotels. In addition to this, it maintains a number of automobiles at its central garage at 1231 20th Street, N. W., for general

55 use, and advertises on theatre programs, in the newspapers, and prominently on the back of telephone directories, setting out the excellence of its service "and featuring the fact that its vehicles may be obtained by telephoning to its garage, the telephone number of which is North 1212. It makes every effort to extend

its business and particularly by encouraging the use of the telephone to its garage, for securing its service." 35% of the 203,000 service trips which were made during the last fiscal year ending April 30, 1913, originated at the Union Station. 40% originated at its central garage and 25% originated at the various hotels with which the company had contracts. Practically all of the business which originated at the central garage was arranged for by telephone.

The customer or patron of the Taxicab Company is entitled to the exclusive use of the vehicle for the time being and has the right to direct the destination of such vehicle at his pleasure. Many of the service charges made are determined by the special character of the business to be performed, the rates being made with the customer by special agreement. The company claims to run its business on the same principle as a private livery. It does not undertake to carry any person who does not apply at its place of business by telephone or otherwise, except such as come within its contract with the Terminal Company, hotels, department stores, theatres, etc. It refuses to carry persons whom it has reason to doubt would pay for the service when rendered and claims the right to refuse to carry for any reason whatsoever.

Is this Taxicab Company an agency "for public use for the conveyance of persons or property within the District of Columbia for hire"? If it is, the law clothes the Public Utilities Commission with jurisdiction to control and regulate its rates and service in the public interest. The contention is made that it is merely doing "a private livery business" and hence that it is now within the
56 purview of this statute. In support of this contention it is said that the company does not carry all persons indiscriminately; that the vehicle employed in a particular service is for the exclusive use of the passenger or passengers carried; that the company does not solicit patronage on the public streets and that the service rendered at the Union Station is "a private service under the complete control of the Washington Terminal Company."

In the exercise of the power of governmental regulation "it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in doing so to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold." Munn vs. Illinois, 94 U. S. 113, 125. The word "taxicab" has come into use as aptly descriptive of a cab operated by motor power, electricity, or other artificial means, and it has been held to be included in the class of common carriers. Lynch vs. Murphy Hotel Co., 112 N. Y. Sup. 915; Donnelly vs. Phila. & R. Ry. Co., 53 Pa. Sup. Ct. 78. In the brief of counsel for appellant taxicabs are described as "vehicles equipped with a mechanical device which registers the distance traveled and the charge therefor." The name, therefore, by which appellant has chosen to be known, implies that it is engaged in a public and not a private business, and the vehicles which it employs in carrying on that business are of such known character as to invite public patronage generally. Moreover, this Taxicab Company, through its ad-

vertisements, holds itself out as an agency for public use, for it invites patronage indiscriminately. Whether, after having invited the public generally to apply, it has in some instances arbitrarily chosen whom it would serve, the character of its business has not been changed. Lloyd vs. Haugh, 223 Pa. 148. As to its service at the Union Station, there is no pretence that it does otherwise than
serve, as under its contract and public duty it is required to
57 do, all persons using that station. It is of no consequence
that it does not solicit business upon the streets of the city, since it is not necessary to justify regulation of a business that it be of a monopolistic character. Brass vs. Stoeser, 153 U. S. 391; German Alliance Ins. Co. vs. Kansas, 233 U. S. 389, 410. It may be suggested, however, that if a service extending over three or four city blocks was required time could be saved by telephoning for a taxicab, even although a horse-drawn vehicle stood at the curb. This probably is the real reason why it is not deemed necessary to solicit business on the streets. Nor does it matter that a passenger is given that for which he pays, the exclusive use of a vehicle for the trip. One engaging the use of a moving van to move his household goods is entitled to its exclusive use, but the proprietor nevertheless is a common carrier if he holds himself out as a mover of goods for the general public. Jackson Iron Works vs. Haugh, 223 Pa. St. 148; Lawson vs. Judge of Recorder's Court, 175 Mich. 375. It is matter of general knowledge that the trolley car, the elevated railway, the subway, the herdic and the taxicab have wrought a radical change in urban travel. Each serves a particular public purpose and each, to a marked degree, affects the public. This was so well known to Congress that it employed the comprehensive language found in the Act under consideration. If the business of insurance is so far affected with a public interest as to justify legislative regulation, and the Supreme Court has ruled that it is, (German Alliance Ins. Co. vs. Kansas, 233 U. S. 389), surely the business of this Taxicab Company is affected with a like interest. We think the company is a common carrier within the scope, intent and meaning of the Public Utilities Act. Its business is public and not private and that business should be and is subject to reasonable regulation for the benefit of the public.

In appellant's amended bill it is averred that the Commission has failed to assume jurisdiction over others engaged in the same character of business, and it is here contended that "if the Act is to be
construed as permitting the Commission to single out the
58 appellant company for regulation and control from among
others of the same class, it is unconstitutional and void." In the agreed statement of the case it is conceded by the Utilities Commission that it has not assumed jurisdiction over certain public hackmen and automobile livery concerns "for the reason that the Commission did not consider that they did business sufficiently large to come within the meaning of the Public Utilities Act as construed by said Commission."

The Act does not confer upon the Commission arbitrary power. It defines a common carrier, and all answering the terms of that

description are within the purview of the Act. Whether or not the Commission has erred in a given case has no bearing upon the question here involved. In other words, the question here is whether the appellant, and not some other corporation, is a common carrier. Yick Wo vs. Hopkins, 118 U. S. 356, cited by appellant, involved the constitutionality of a municipal ordinance to regulate the carrying on of public laundries within the limits of a municipality and which conferred upon the municipal authorities arbitrary power to give or withhold consent as to persons or places without regard to the competency of the persons applying or the propriety of the place selected for the carrying on of the business. In the present case, as above suggested, all falling within the defined class without exception are brought within the scope of the Act. There is, therefore, no room for the exercise of arbitrary power by the Commission.

Decree affirmed with costs.

Affirmed.

59 January Term, 1915.

No. 2691.

MONDAY, February 1st, A. D. 1915.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Appellant,

vs.

CHESTER HARDING, OLIVER P. NEWMAN, and FREDERICK L. SIDDONS, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE ROBB.

February 1, 1915.

60 FRIDAY, February 5th, A. D. 1915.

No. 2691.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Appellant,

vs.

CHESTER HARDING, OLIVER P. NEWMAN, and FREDERICK L. SIDDONS, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate.

The retirement of Chester Harding and Frederick L. Siddons, and the appointment of Charles W. Kutz and Louis Brownlow, as Commissioners of the District of Columbia, having been suggested, It is on motion of Mr. G. Thomas Dunlop, attorney for the appellant, now here ordered by the Court that the said Charles W. Kutz and Louis Brownlow, Commissioners of the District of Columbia, be and they are hereby made parties appellee in the above entitled cause in the place and stead of the said Chester Harding and Frederick L. Siddons, retired.

61 FRIDAY, February 5th, A. D. 1915.

No. 2691.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Appellant,

vs.

CHARLES W. KUTZ, OLIVER P. NEWMAN, and LOUIS BROWNLOW, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate.

On motion of Mr. G. Thomas Dunlop, attorney for the appellant in the above entitled cause, It is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

62 (*Bond on Appeal.*)

Know all Men by these Presents, That we, the Terminal Taxicab Company, Incorporated, as principal, and Globe Indemnity Company, of New York, as surety, are held and firmly bound unto Charles W. Kutz, Oliver P. Newman and Louis Brownlow, Commissioners of the District of Columbia, constituting as such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an

alleged body corporate, in the full and just sum of three hundred (300) dollars, to be paid to the said Charles W. Kutz, Oliver P. Newman and Louis Brownlow, Commissioners of the District of Columbia, constituting as such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an alleged body corporate, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 4th day of February, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between the said Terminal Taxicab Company, Incorporated, as appellant, and plaintiff below, and the said Charles W. Kutz, Oliver P. Newman and Louis Brownlow, Commissioners of the District of Columbia, constituting as such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an alleged body corporate, appellees and defendants below, a decree was rendered against the said Terminal Taxicab Company, Incorporated, and the said Terminal Taxicab Company, Incorporated, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said appellees and defendants below citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Terminal Taxicab Company, Incorporated, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Terminal Taxicab Company.]

TERMINAL TAXICAB COMPANY, INC., [SEAL.]
By G. THOMAS DUNLOP, *President.* [SEAL.]

Attest:
WALTER G. DUNLOP, *Secretary.*

[Seal of Globe Indemnity Company of New York.]

GLOBE INDEMNITY COMPANY, [SEAL.]
By R. B. CUMMINGS, *Att'y in Fact.* [SEAL.]

Attest:
EDWARD F. RIGGS, *Att'y in Fact.*

Sealed and delivered in presence of—
—— ——.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 2691. Terminal Taxicab Co., &c., Appellant, vs. Charles W. Kutz et al. Bond for costs on appeal to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Feb. 5, 1915. Henry W. Hodges, Clerk.

63 UNITED STATES OF AMERICA, *ss:*

To Charles W. Kutz, Oliver P. Newman and Louis Brownlow, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Terminal Taxicab Company, Incorporated, a body corporate, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 5th day of February, in the year of our Lord one thousand nine hundred and fifteen.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 5th day of February, A. D. 1915.

CONRAD H. SYME,
Gen'l Counsel Public Utilities Com., D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Feb. 5, 1915. Henry W. Hodges, Clerk.

64 Court of Appeals of the District of Columbia, January Term, 1915.

No. 2691.

TERMINAL TAXICAB COMPANY, INCORPORATED, a Body Corporate, Appellant,

v.

CHARLES W. KUTZ, OLIVER P. NEWMAN, and LOUIS BROWNLOW, Commissioners of the District of Columbia, Constituting as Such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an Alleged Body Corporate.

Assignment of Errors.

Now comes the appellant, plaintiff below, in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the order of this honorable court on the 1st day of February, 1915, affirming the decree of the Equity Division of the Supreme Court of the District of Columbia dismissing plaintiff's original and amended bills.

I.

The Court of Appeals of the District of Columbia erred in affirming the decree of the Supreme Court of the District of Columbia, dismissing the appellant's original and amended bills,

1. Because the defendants, constituting the Public Utilities Commission of the District of Columbia, were and are, as matter of law, without jurisdiction to pass any order or to take any action affecting the plaintiff, as shown by the language of the act of Congress of March 4, 1913, establishing said Public Utilities Commission,

65 apparent upon the face thereof.

2. Because the defendants, constituting the Public Utilities Commission of the District of Columbia, were and are, as matter of law, without jurisdiction to pass any order or to take any action affecting the plaintiff as established by bills, answer and proof herein.

3. Because it was established by bills, answer and proof that the defendants so arbitrarily, unreasonably, and with unjust discrimination have construed and attempted to enforce the provisions of the aforesaid Act of Congress, approved March 4, 1913, against the plaintiff as that the said act and any and all orders of the said Public Utilities Commission purporting to be in pursuance thereof should be held to be unconstitutional and void, as claimed in plaintiff's amended bill.

4. In holding that the name by which appellant (the Terminal Taxicab Company) has chosen to be known implies that it is engaged in a public and not a private business and the vehicles which it em-

ploys in carrying on that business are of such known character as to invite public patronage generally.

5. In holding that this Taxicab Company through its advertisements holds itself out as an agency for public use, for it invites patronage indiscriminately.

6. In holding that it is of no consequence (in determining whether the business conducted by the appellant is of a public or private nature) that it does not solicit business upon the streets of the city, since it is not necessary to justify regulation of a business that it be of a monopolistic character.

7. In holding that it does not matter (in determining whether the business of the appellant Company is of a public or private nature) that a passenger is given that for which he pays, the exclusive use of a vehicle for the trip.

8. In holding that the appellant Company is a common carrier within the scope, intent and meaning of the Public Utilities Act; that its business is public and not private and that its business should be and is subject to reasonable regulation for the benefit of the
66 public.

9. In holding that the (Public Utilities) Act does not confer upon the Commission arbitrary power.

10. In holding that there is therefore no room for the exercise of arbitrary power by the Commission.

11. In holding, in effect, that the Public Utilities Commission, by the terms of the Public Utilities Act in question, could and can lawfully and properly, and without affecting or violating the rights of the appellant Company, arbitrarily or otherwise, discriminate between said appellant Company and other companies and individuals engaged in taxicab and livery business in the District of Columbia by taking and exercising jurisdiction over the one and not over the other or others; and by passing orders and making regulations with respect to the one and not the other or others; and by requiring the one to comply with all the provisions of the so-called Public Utilities Act and by not requiring such compliance from other corporations and individuals engaged in like business.

12. By refusing to hold that the Public Utilities Act in question (approved March 4, 1913) is a penal statute and is to be strictly construed.

13. By refusing to hold that by the reasonable, natural and proper interpretation of the said act, taxicab and livery businesses were not in the contemplation of Congress in enacting the said legislation, and that said act cannot and should not be construed as applying to such classes of business.

14. In holding that the said Terminal Taxicab Company is a common carrier within the meaning of the so-called Public Utilities Act approved March 4, 1913.

II.

Wherefore the appellant prays that said decree be reversed and that said Court of Appeals of the District of Columbia be ordered

to enter a decree reversing the decision of the lower court in
67 said cause.

G. THOMAS DUNLOP,
Attorney for Appellant.

(Endorsed:) No. 2691. Court of Appeals of the District of Columbia. Terminal Taxicab Company v. Charles W. Kutz et al. The Clerk will please file. Assignment of Errors. Court of Appeal-, District of Columbia. Filed Feb. 11, 1915. Henry W. Hodges, Clerk.

68 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 67 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Terminal Taxicab Company, Incorporated, a body corporate, Appellant, vs. Charles W. Kutz, Oliver P. Newman and Louis Brownlow, Commissioners of the District of Columbia, constituting as such Commissioners the Public Utilities Commission of the District of Columbia, and the Public Utilities Commission of the District of Columbia, an alleged body corporate, No. 2691, January Term, 1915, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 11th day of February, A. D. 1915.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 2, 11, '15. H. W. H., clerk.]

Endorsed on cover: File No. 24,555. District of Columbia Court of Appeals. Term No. 348. Terminal Taxicab Company, Incorporated, appellant, vs. Charles W. Kutz, Oliver P. Newman and Louis Brownlow, Commissioners of the District of Columbia, constituting as such Commissioners the Public Utilities Commission of the District of Columbia, et al. Filed February 12th, 1915. File No. 24,555.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 348.

TERMINAL TAXICAB COMPANY, INCORPORATED, Appellant,

vs.

CHARLES W. KUTZ, OLIVER P. NEWMAN, AND LOUIS BROWNLOW, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, CONSTITUTING AS SUCH COMMISSIONERS THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.

G. THOMAS DUNLOP,
Attorney for the Terminal Taxicab Company, Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX OF SUBJECTS.

List of Cases Cited.

IN THE

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STATEMENT OF THE CASE.

On January 15th, 1914, the Terminal Taxicab Company, the appellant here, filed in the Supreme Court of the District of Columbia a bill in equity against the Commissioners of the District of Columbia in their capacity as the Public Utilities Commission, seeking to enjoin the said Public Utilities Commission from tak-

ing or exercising jurisdiction over the Taxicab Company under the provisions of an Act of Congress approved March 4, 1913, creating the said Public Utilities Commission and giving it jurisdiction over certain so-called public utilities in the District of Columbia, and also seeking to have certain orders of the said Commission declaring their jurisdiction over the said Taxicab Company, and for certain other purposes, vacated and set aside.

This action was brought not only under the general equity jurisdiction of the Supreme Court of the District of Columbia, but in pursuance of the express provisions of paragraph 64, section 8 of the said act, which provides that any public utility or corporation which is dissatisfied with any order or decision of the said commission may commence a proceeding in equity against the said commission to vacate, set aside or modify any such decision or order. The said act also expressly provides for an appeal from the Supreme Court of the District of Columbia to the Court of Appeals of the District of Columbia and therefrom to the Supreme Court of the United States.

The proceedings below were briefly as follows: The so-called Public Utilities Act was approved on March 4, 1913, and was passed for the purpose of conferring upon the Commissioners of the District of Columbia as a Public Utilities Commission the power of regulation and control over all public utilities in the District of Columbia with certain exceptions; the term "public utility" being defined as embracing street railroads, common carriers, gas plants, electric plants, water power companies, telephone corporations, telegraph lines and pipe line companies. The act expressly excepted from such regulation and jurisdiction steam

railroads, the Washington Terminal Company and the Washington and Norfolk Steamboat Company and all companies engaged in interstate traffic upon the Potomac River and Chesapeake Bay. The term common carrier as expressly defined in section 8, paragraph 1 of said act, "includes express companies and every corporation, street railroad corporation, company, association, joint stock company or association, partnership, and person, their lessees, trustees or receivers, appointed by any court whatsoever, owning, operating, controlling, or managing any agency or agencies for *public use for the conveyance of persons or property within the District of Columbia for hire.*" Nowhere in the act is any reference directly or indirectly (unless as above) made to taxicabs, hacks, carriages, automobiles, liveries, whether public or private, or any such or other similar modes of conveyance. The act, which goes into very minute details as to matters of regulation, makes many provisions expressly applicable to each particular class of public utilities embraced within its terms, but nowhere are any provisions made which would be expressly or particularly or peculiarly applicable to taxicabs, hacks, carriages, automobile liveries or any other similar modes of conveyance. Unless it can be found in the term "common carrier" and its definition as above quoted, there is absolutely nothing in the act tending to show that Congress had in mind the regulation of any such modes of conveyance.

On the contrary Congress by an act authorizing the Commissioners of the District of Columbia to make police regulations for the government of said District, approved January 26, 1887, had expressly authorized and empowered said Commissioners (that is, the Com-

missioners of the District of Columbia as such) to make and enforce police regulations "to establish and regulate the charges to be made by owners of hacks and hackney carriages of any kind whatsoever," and "to regulate the movements of vehicles on the public streets and avenues for the preservation of order and protection of life and limb," and provided certain penalties. This act was not expressly or otherwise repealed by the said so-called public utilities act which is in question. In pursuance of the act of 1887, the Commissioners of the District of Columbia passed and have since enforced and are now enforcing certain police regulations regulatory of public vehicles for the conveyance of passengers, designated by them as hacks, which completely control their operations and which are set out in the transcript of record (R., pp. 32, 33 *et seq.*). These police regulations have never been expressly or otherwise repealed.

By an act commonly known as the personal property and license tax law approved July 1, 1902, (R., 31) Congress had provided by paragraph 11 "that proprietors or owners of hacks, coaches, omnibuses, carriages, wagons, and other passenger vehicles for hire, shall pay license taxes as follows: * * * auto vehicles, automobiles, electro-mobiles or other horseless vehicles by whatever name called, $9 per annum," and also that the driver should wear a certain badge, and by the same act also provided (R., 39) "that proprietors or owners of establishments where auto vehicles of any pattern or description or motor power whatsoever are kept for hire or are kept or stored for others for profit or gain" shall pay a certain license tax. "Provided, that nothing in this paragraph shall be so construed as to exempt the owner of *any vehicle using the public*

stands from paying the additional license tax as provided in paragraph 11 of this section" (R., p. 39). This latter is commonly known as the garage and livery stable tax. This latter act is likewise not repealed directly or indirectly by the public utilities act.

The Terminal Taxicab Company since its incorporation and organization, under the laws of Virginia in May, 1908, as a private business corporation (R., p. 30), had been operating an automobile, taxicab, and livery business from its garage in Washington, and has paid the tax under the provisions of paragraph 13 above referred to. It had also taken out licenses for some of its vehicles to operate as public hacks under the provisions of paragraph 11 above cited, and had paid the license fees thereby imposed. At the time of the beginning of these proceedings, however, it had abandoned the public hack business and since July 1, 1913, has not licensed or operated any of its vehicles as public hacks (R., p. 33). It has since its organization conducted and is now conducting an automobile livery businesss by means of so-called taxicabs which are vehicles equipped with a mechanical device which registers the distance travelled and the charge therefor, touring cars, limousines, and other types of automobiles. Its vehicles may be and are obtained either directly or by telephone from its main or branch garages. It has also contracts for supplying livery service to the Union Station of the Washington Terminal Company where it maintains a licensed branch garage on the premises of the Washington Terminal Company (R., 31, 39, 41, 42) and pays the tax therefor, and has as well similar contracts with various hotels for supplying automobile livery service to their guests and patrons. For the purpose of serving such hotels,

their guests and patrons promptly, certain of the Company's vehicles were kept standing in front of the hotels, the drivers of which vehicles were, however, not permitted by the regulations of the Company either to solicit or accept engagements from the public on the streets, but are confined to serving the guests and patrons of the hotels (R., p. 38). No vehicles of this company have ever exhibited any "For Hire" sign upon them or other devices indicating that they could be hired by the public. On the contrary every vehicle is supplied with a card in the form of a notice that the vehicle is not a public hack; that the Taxicab Company does not hold itself out to be a common carrier, nor a public carrier of passengers; that the vehicles are strictly private and not public carriages; that they are and will be hired only by special agreement with and to such persons and upon such terms as shall be approved by the Company and that the Company reserves the right to refuse service at its pleasure and to determine in each instance whether it will or will not engage for the particular service desired (R., p. 49).

The vehicles of this Company while standing on the street adjacent to the hotel and in its service exhibit thereon conspicuous cards as follows: "FOR GUESTS AND PATRONS OF THIS HOTEL ONLY" (R., pp. 39, 48).

In the conduct of its livery business the Company not only has reserved the right to discriminate and to refuse its services to such as it does not care to serve, but has in fact exercised such privilege and has refused on occasions to hire to certain individuals who were objectionable for one reason or another (R., p. 37).

The Company lets its vehicles to such as hire them for the exclusive and private use of the customer or

patron. In every such instance and so long as the vehicle is in the service of the person hiring it the complete control and exclusive use of such vehicle is under his sole direction. He has the right to direct its destination at his pleasure; he can occupy it alone or accompanied by his guests according to his choice, and for any length of time; he can exclude from it any and every person whether there be room in the vehicle for others or not; and can use it while in his service precisely as though it were his private property. The Company is in competition with many other automobile livery concerns in Washington and is very often compelled to meet competitive rates. Many of its charges are determined by the special character of the business performed, the rate being made by special agreement with the customer (R., p. 39). Its vehicles can be hired by the hour at rates quoted upon application to its garage, as in the case of any other private livery or for a certain fixed or flat sum for the particular service desired, also settled in each instance by special agreement, and such of its vehicles as are equipped with taximeters may be hired upon the basis of the distance carried, to be determined by the meter. In short, the Company claims to run its business on the same principle as a private livery. It does not undertake and constantly refuses to carry people who apply on the public streets. It advertises its business conspicuously on the back of the local telephone directory and elsewhere, making a feature of the fact that it may be reached at its garage directly or over the telephone and advertises also that it does private storage of automobiles, both gasoline and electric, and does expert repair work in its shops (R., p. 41).

Shortly after the organization of the Public Utilities

Commission the appellant Company was notified of a certain order of the said Commission requiring the Terminal Taxicab Company, as a public utility, to make certain reports to the said Commission. The Company thereupon immediately notified the Commission that it denied the Commission's jurisdiction over it, stating that it was not a public utility nor a common carrier within the meaning of the act, etc. (R., p. 42). Thereafter the said Commission held public hearings for the purpose of determining its jurisdiction over the appellant company and others similarly situated who had questioned its jurisdiction, at which certain testimony was adduced by the Commission; all of which the appellant Company claimed and now claims to be irrelevant and to have no tendency to prove it to be a common carrier or otherwise within the jurisdiction of the said Commission.

On January 3, 1914, however, the Commission issued an order known as "No. 44" in which it decided that the Terminal Taxicab Company, the appellant, among others is engaged in the business of a common carrier within the meaning of the Public Utilities Act and therefore within the jurisdiction of the Commission. The appellant Company thereupon notified the Commission of its dissatisfaction with said order and thereafter brought these proceedings to review, set aside and declare null and void the said order and to enjoin the Commission from exercising jurisdiction over it.

At the hearing upon this bill in the Supreme Court of the District of Columbia the evidence showed that 150 persons owning and operating automobiles and horse-drawn vehicles as public hacks and public taxicabs in Washington under the provisions of the police regulations applicable to such public-hack business,

and 33 individuals, corporations and partnership concerns, operating automobiles in livery service for hire and who so advertise and who have secured licenses from the District Commissioners so to do, were not and are not regulated by the said Public Utilities Commission and that such Commission has not assumed jurisdiction over them and does not intend to exercise jurisdiction over such concerns for the alleged reason that they do not consider that they are doing business sufficiently large in volume to come within the meaning of the public utilities act. In view of the discrimination thus exercised by the Public Utilities Commission the appellant Company filed an amended bill setting up said discrimination and charging that the said acts and omissions and all orders, rules, and decisions based thereon or in pursuance thereof are unjustly discriminatory, unreasonable, and void and that if the public utilities act is to be construed as requiring or permitting such discrimination it is unconstitutional and void.

The Public Utilities Commission filed an answer denying some of the averments of the Company's bill but admitting most of them.

The Supreme Court of the District of Columbia dismissed the bill but no written opinion was filed and the record does not disclose the grounds upon which the decision was based. It may be proper to state, however, that the court was of the opinion that the business of the appellant Company was that of a common carrier within the meaning of the act.

The plaintiff Company appealed to the Court of Appeals of the District of Columbia, which in an opinion (R., 50) affirmed the decree of the lower court and the plaintiff has now appealed to this court.

The case is here as it was below upon an agreed statement (R., 30).

ASSIGNMENT OF ERRORS.

The Court of Appeals of the District of Columbia erred in affirming the decree of the Supreme Court of the District of Columbia, dismissing the appellant's original and amended bills,

1. Because the defendants, constituting the Public Utilities Commission of the District of Columbia, were and are as matter of law, without jurisdiction to pass any order or to take any action affecting the plaintiff, as shown by the language of the act of Congress of March 4, 1913, establishing said Public Utilities Commission, apparent upon the face thereof.

2. Because the defendants, constituting the Public Utilities Commission of the District of Columbia, were and are, as matter of law, without jurisdiction to pass any order or to take any action affecting the plaintiff as established by bills, answer and proof herein.

3. Because it was established by bills, answer and proof that the defendants so arbitrarily, unreasonably, and with unjust discrimination have construed and attempted to enforce the provisions of the aforesaid act of Congress, approved March 4, 1913, against the plaintiff as that the said act and any and all orders of the said Public Utilities Commission purporting to be in pursuance thereof should be held to be unconstitutional and void, as claimed in plaintiff's amended bill.

4. In holding that the name by which appellant (Terminal Taxicab Company) has chosen to be known implies that it is engaged in a public and not a private business and the vehicles which it employs in

carrying on that business are of such known character as to invite public patronage generally.

5. In holding that this Taxicab Company through its advertisements holds itself out as an agency for public use, for it invites patronage indiscriminately.

6. In holding that it is of no consequence (in determining whether the business conducted by the appellant is of a public or private nature) that it does not solicit business upon the streets of the city, since it is not necessary to justify regulation of a business that it be of a monopolistic character.

7. In holding that it does not matter (in determining whether the business of the appellant Company is of a public or private nature) that a passenger is given that for which he pays, the exclusive use of a vehicle for the trip.

8. In holding that the appellant Company is a common carrier within the scope, intent and meaning of the Public Utilities Act; that its business is public and not private and that its business should be and is subject to reasonable regulation for the benefit of the public.

9. In holding that the (Public Utilities) Act does not confer upon the Commission arbitrary power.

10. In holding that there is therefore no room for the exercise of arbitrary power by the Commission.

11. In holding, in effect, that the Public Utilities Commission, by the terms of the Public Utilities Act in question, could and can lawfully and properly, and without affecting or violating the rights of the appellant Company, arbitrarily or otherwise, discriminate between said appellant Company and other companies and individuals engaged in taxicab and livery business

in the District of Columbia by taking and exercising jurisdiction over the one and not over the other or others; and by passing orders and making regulations with respect to the one and not the other or others; and by requiring the one to comply with all the provisions of the so-called Public Utilities Act and by not requiring such compliance from other corporations and individuals engaged in like business.

12. By refusing to hold that the Public Utilities Act in question (approved March 4, 1913) is a penal statute and is to be strictly construed.

13. By refusing to hold that by the reasonable, natural and proper interpretation of the said act, taxicab and livery businesses were not in the contemplation of Congress in enacting the said legislation. and that said act cannot and should not be construed as applying to such classes of business.

14. In holding that the said Terminal Taxicab Company is a common carrier within the meaning of the so-called Public Utilities Act approved March 4, 1913.

ARGUMENT.

If we are to understand from the opinions of this Court in the cases of German Alliance Insurance Company vs. Lewis, 233 U. S. 389, and Brass vs. Stoeser, 153 U. S. 391, that whether any given business is so affected with a public interest as not only to justify regulation in other respects but also the fixing of rates, is a legislative rather than a judicial question, or to use the language of the court, "for those who make, not for those who interpret the laws," then it would seem useless to even assert the proposition that if the Act in question in this case exhibits a clear legislative intention to include within its effect such busi-

ness as that of this appellant, the statute is to that extent unconstitutional and void.

This concession, however, falls far short of disposing of this case for we are not so much concerned here, if at all, with the constitutionality of such legislation as with the proper interpretation of this statute. In none of the cases in this court in which the question whether certain classes of business were subject to rate or other regulation by the legislature has arisen, has there been any doubt that the Act in question in terms applied, or was intended to apply, to the particular business under discussion. In this case, however, as will be pointed out, Congress has not in terms applied the provisions of this Act to either taxicabs, liveries, automobiles, or cabs, or used other terminology indicating any such particular class or classes of business. It has only been specific to the extent that it has included within the terms of the Act "common carriers" which the Act defines as "any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire". At the same time it has indicated, and we think clearly, by the nature of the regulatory provisions of the act applicable to all common carriers that such a business as that conducted by the appellant was not and could not have been within its contemplation. Certainly such a general description lacks that certainty which would be necessary to charge such a defendant in a criminal prosecution under the provisions of this act with knowledge that he came within its penalties.

U. S. vs. Reese, 92 U. S. 214.

I.

Analysis of Opinion of the Court of Appeals.

The Court of Appeals of the District of Columbia in holding the act in question applicable to the business of the appellant company says, "It is of no consequence that it does not solicit business upon the streets of the city, since it is not necessary to justify regulation of a business that it be of a monopolistic character", citing Brass vs. Stoeser, 153 U. S. 391; German Alliance Insurance Company vs. Lewis, 233 U. S. 389, 410.

And further, that "it is a matter of general knowledge that the trolley car, the elevated railway, the subway, the herdic and the taxicab have wrought a radical change in urban travel. It serves a particular public service, which, to a marked degree, affects the public. This was so well known to Congress that it employed the comprehensive language found in the act under consideration. If the business of insurance is so far affected with a public interest as to justify legislative regulation, and the Supreme Court has ruled that it is, (German Alliance Insurance Company vs. Lewis, 233 U. S. 391), surely the business of this Taxicab Company is affected with a like interest." If the question here were solely or at all whether this Company were doing such a business as would justify legislation regulating it, this argument would be applicable, but it is respectfully submitted that it is scarcely applicable and not at all helpful in determining whether Congress intended to include within the definition of "common carrier" the business of one who is admittedly not engaged in soliciting patronage upon the public streets, especially when such business is not otherwise de-

scribed and when it is not of the character generally understood and held by the courts to be that of a common carrier. The Court of Appeals itself, [as did this court, in Munn vs. Illinois, 94 U. S. 113, 125], seems to have found it necessary to draw a distinction between common carriers and hackmen and to separately classify them, for in the opinion it quotes from the case cited to the effect that "it has been customary in England from time immemorial and in this country from its first colonization, to regulate ferries, *common carriers, hackmen,* bakers, millers, wharfingers, innkeepers, etc." Neither of the two cases cited by the Court of Appeals to the effect that a "taxicab has been held to be a common carrier" (Lynch vs. Murphy Hotel Co., 112 N. Y. S., 915; Donnelly vs. Phila. P. & R. R. R. Co., 53 Pa. Sup. Ct. 78), support the proposition. No such question was raised or decided in the Lynch case, and in the Donnelly case the taxicab was a licensed public vehicle plying the public streets for hire, and was hired at a public stand.

The Court of Appeals also undertakes to determine for the first time in any court, and without the slightest evidence in the record to support it, that the mere name "taxicab" as applied to a vehicle implies that it is engaged in a p blic and not a private business, and this because, as the court says, "The vehicles (are) equipped with a mechanical device which registers the distance travelled and the charge therefor." (R. 52.) As well might we say that the corner groceryman is engaged in a public and not a private business because forsooth he uses a cash register in his business or computing scales to determine and register mechanically the amount which his customer is to pay. Unless, therefore, there is no such thing known to the law as a private livery business, it must inevitably follow in

this jurisdiction at least that the moment a private liveryman for his own protection and the protection of his customer against the fraud or dishonesty of his driver, or merely for the purpose of affording his customer exact information with respect to the service rendered, places upon his vehicle a taximeter or indeed a speedometer, he becomes a common carrier and he is *ipso facto* engaged in a public and not a private business. Again the Court of Appeals says, "Moreover, this Taxicab Company, through its advertisements, holds itself out as an agency for public use, for it invites patronage indiscriminately." This is equivalent to a direct affirmation that the merchant or other business man who advertises indiscriminately for business holds himself out as an agency for public use.

With reference to the largest single item in the Company's business, the Court of Appeals (R., 53) says, "As to its service at the Union Station there is no pretense that it does otherwise than serve, as under its contract and public duty it is required to do, all persons using that station." As is pointed out in this brief, the Public Utilities Act (Sec. 8, par. 1) itself expressly exempts from the jurisdiction of the Commission the business of the Washington Terminal Company. If this Taxicab Company is required by its public duty, to say nothing of its contract with the Washington Terminal Company, to serve all persons using the station, it can only be upon the theory that the Washington Terminal Company is, as it has been held to be, a common carrier, and that as such it has the commensurate duty of serving the public with taxicabs at its station. By performing this supposed duty through an agent, can it escape the supervision of the Interstate Commerce Commission with respect thereto? Is it not clear that if this service at

the station is as the Court of Appeals implies, a public duty, it is the public duty of the Washington Terminal Company and not within the jurisdiction of the Public Utilities Commission?

The substance of the opinion of the Court of Appeals is, therefore, as was the position of the Commission, that the Company in question is a common carrier and within the jurisdiction of the Public Utilities Commission because it is expedient that it should be regulated; that so-called taxicabs have become such a usual and necessary mode of conveyance that on general principles they should be construed to be "common carriers," and particularly because this Company conspicuously advertises for business and because the telephone system of the city is extensively used to secure its service, and therefore its business is essentially public in its nature and is so indelibly impressed with a public use in the public mind that it has become a public utility. This is the sum and substance of the Commission's case, and that it has no other foundation in either principle or authority is emphasized by the fact that the Commission has not, and admits that it has not, undertaken to assume jurisdiction over or to regulate the smaller livery concerns doing precisely the same class of business or the licensed public hacks and taxicabs which are owned by individuals having usually but one or two vehicles apiece.

In other words, in the mind of the Commission, and of the court below, the nature of the business performed is of no importance in determining whether the particular concern in question is operating an agency for public use for the conveyance of persons or property for hire or is a common carrier, but that the fact that it is a comparatively large concern which exten-

sively advertises its facilities and has a large patronage are the all-controlling factors.

Of course this argument might equally well apply, as defining a public utility, to any other comparatively large business enterprise of whatever nature in the city. If we are to give no force whatever to the usually accepted meaning of the term "common carrier" and are to say that the whole question is simply whether or not the concern in question is what might be called a public utility, or simply because of the extent of its business is a concern in which the public is in some manner interested, then we could equally well characterize the newspapers, the department stores, the banks, the hotels, the bakeries, and many other classes of private business as public utilities.

II.

A Penal Statute; to be Strictly Construed.

No such liberal rule of construction can be applied, however, to the act in question, for it is essentially a penal statute and must be strictly construed. Paragraphs 79, 80, 81, 83, 84, 85, and 86 provide heavy penalties by fine and imprisonment for violations of its various provisions, and it is provided by paragraph 87 "that every day during which any public utility or officer, agent or employee thereof shall fail knowingly or willfully to observe and comply with any order or direction of the Commission, or to perform any duty enjoined by this section, shall constitute a separate and distinct violation of such order or direction or of this section, as the case may be."

It comes, therefore, distinctly within the class of legislation such as is involved in the line of United

States Supreme Court authorities of which Butts vs. Merchants and Miners Transportation Co., 230 U. S. 126, decided by this court on June 16, 1913, is the latest if not the most important. The court say (p. 133):

> "Besides, it is not to be forgotten that the intended law is both penal and criminal. Every act of discrimination within its terms is made an offense and misdemeanor, and for every such offense it gives to the aggrieved party a right to a penalty of $500, and subjects the offender to a fine of not less than $500 nor more than $1,000, or to imprisonment for not less than thirty days nor more than one year."

Quoting from the case of U. S. vs. Reese, 92 U. S. 214, the court further say:

> (P. 219:) "This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. United States vs. Wiltberger, 5 Wheat., 85; 5 L. Ed., 40. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect."

In the Reese case, *supra,* the court say further:

> "Nothing should be left to construction if it can be avoided. The law ought not be in such a condition that the elector may act upon one idea of its meaning and the inspector upon another. * * * Laws which prohibit the doing of things and provide a punishment for their violation should have no double meaning. A citizen should

not unnecessarily be placed, where by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit of discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense and thinks it is confined to a wrongful discrimination on account of race, etc., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * *

"There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular." * * *

"It would certainly be dangerous if the legislature could set a net large enough to catch all

possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

If it is dangerous to lodge such power with the courts, is it not equally dangerous that a quasi-judicial commission should be vested with the power to say that some concerns doing a livery business in the District of Columbia are common carriers and public utilities within the meaning of such broad and general terms and that others doing a precisely similar business and the owners and operators of licensed public hacks and taxicabs are not? Surely those concerns in the District of Columbia who are daily operating agencies which any individual may employ for the conveyance of persons or property within the District of Columbia for hire, [and there are admittedly hundreds of them who are not complying and who are not being required to comply with any of the provisions of this act,] are taking an enormous risk if at any moment the Commission may determine to prosecute them. See also:

Commonwealth vs. Goldman, 205 Mass., 400.

Following out the suggestion of this court in the Butts case that the whole statute is to be taken together in determining its meaning, the language of the Supreme Court of New York in N. Y. C., etc., R. R. vs. Sheely, 27 N. Y. S., 185, is extremely important as indicating whether such a definition of a common carrier as is afforded by the language of this act is sufficiently definite to warrant the assumption that the legislature intended to embrace within its terms such vehicles as taxicabs, cabs, or drays. In that case, to

be sure, the court was not considering the language of the statute in its penal aspects, nevertheless they say:

> "Do the words 'common carrier' apply as well to hackmen and draymen as express, dispatch companies, shippers and forwarders? Was it intended by the legislature to place them all in the same category? * * * When the legislature speaks of 'common carriers' in a statute regulating the transportation of persons and property by railroad companies, transportation, express or dispatch companies and shippers, is it proper to give to those words such an interpretation as shall embrace carriers of persons and property through and along the streets of a city in hacks, cabs or drays? We cannot conceive that the legislature intended to intermingle subjects so diverse in their nature and character in one sentence. * * * It would be most unusual in a provision designed to benefit or protect hackmen and draymen to designate them simply as 'common carriers' without any other words or expression to indicate they were intended, and especially so when it clearly and unquestionably appears that the statute was primarily enacted for the protection and benefit of persons or companies engaged in the business of common carriers of property over railroad lines. Since there is considerable uncertainty in the books in respect to the application of the term 'common carriers' to licensed hackmen or draymen we would not be justified in holding or inferring that the law-making power intended to classify them with those who are clearly and strictly 'common carriers.' To do so would be a very liberal interpretation indeed. * * * *If such a purpose was within the intention of the legislature, it is reason-*

able to suppose that appropriate words would be found to give it expression; but here there is not the slightest reference in the entire section to the business of hackmen or draymen.'' (Italics ours)

Penal statutes are to be strictly construed and matters and things which are not clearly included cannot be brought within the operation of such statutes by construction.

(Ill., 1905:) Chicago, R. I. & P. R. Co. vs. People, 75 N. E., 368; 217 Ill., 164.
(Ind., 1885:) Fahnestock vs. State, 1 N. E., 372; 102 Ind., 156.
(Ind., 1886:) Board of Com'rs of Marion County vs. Center Tp., 2 N. E., 368; 105 Ind., 422.
(Mass., 1807:) Commonwealth vs. Macomber, 3 Mass., 254.
(Mass., 1808:) Commonwealth vs. Barlow, 4 Mass., 439.
(Mich., 1875:) Meister vs. People, 31 Mich., 99.
(Mo., 1873:) Howell vs. Stewart, 54 Mo., 400.
(Mo., 1894:) State vs. Reid, 125 Mo., 43; 28 S. W., 172.
(Mo., 1896:) State vs. Gritzner, 134 Mo., 512; 36 S. W., 39.
(Mo., 1902:) Rixke vs. Western Union Telegraph Co., 96 Mo. App., 406; 70 S. W., 265.
(Mo., 1904:) State *ex Rel.* McPherson vs. St. Louis & S. F. R. Co., 79 S. W., 714; 105 Mo. App., 207.
(Mo., 1905:) Pollard vs. Missouri & K. Telephone Co., 90 S. W., 121; 114 Mo. App., 533.
(Neb., 1902:) McCormick Harvesting Mach. Co. vs. Mills, 89 N. W., 621; 64 Neb., 166.

(Neb., 1906:) State vs. Dailey, 107 N. W., 1094; 76 Neb. 770.

(N. Y. Sup., 1904:) Department of Health of City of New York vs. Owen, 88 N. Y. S., 184; 94 App. Div., 425, affirming 85 N. Y. S., 397; 42 Misc. Rep., 221.

(Okl., 1904:) First Nat. Bank vs. National Live Stock Bank, 76 P., 130; 13 Okl., 719.

And this is true even though the statute itself provides in a general way that it is to be liberally construed.

O'Connor vs. State, 71 S. W., 409.

III.

The Reasonable, Natural and Proper Interpretation of the Act.

The act in question is limited in its application and scope by the language of the next to the last sentence of paragraph 1 of section 8 as follows:

> "This section shall apply to the transportation of passengers, freight or property from one point to another within the District of Columbia, and any common carrier performing such service;"

and the sentence following provides that the law is applicable to other corporations formed to acquire property or to transact business which would be subject to the provisions of this section and to corporations possessing franchises for any of the purposes contemplated by the section of the act in question. This latter clause obviously refers to such particular

classes of business as are specifically mentioned in the act, such as telegraph and telephone companies, electric light and power companies, gas companies, water-power and pipe-line companies.

It is not claimed that such a business as that transacted by the Terminal Taxicab Company is *expressly* brought within the provisions of this act, and the only reason for claiming that such a business is *contemplated* by the act is that it may be embraced within the meaning of the term "common carrier" in the paragraph first hereinbefore referred to.

Earlier in paragraph 1 the term "common carrier" is defined as follows:

> "The term 'common carrier' when used in this section includes express companies and every corporation, street-railroad corporation, company, association, joint-stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any agency or agencies *for public use* for the conveyance of persons or property within the District of Columbia for hire."

Before the Terminal Taxicab Company or any concern doing a like business can therefore be held to be included within the provisions of this section, it must be found to fit this definition, *i. e.*, it must be found to be an agency *for public use* for the conveyance of persons or property within the District of Columbia. This language is equivalent to the common-law definition of a "common carrier" of passengers, as we shall show elsewhere in this brief.

It is respectfully submitted that, from even a casual reading of the act establishing the Public Utilities

Commission, Congress did not have in contemplation regulation, by the methods therein adopted, of any such concerns as livery stables, taxicab companies, drayage and parcel delivery companies, who have no franchises; who are in no sense monopolies; who neither have nor make any preferential use of the public streets; who have no tracks, conduits, wires, poles, subways, tunnels, or other fixed property occupying public space, and which have no fixed route or routes in the transaction of their business, and which are subject to the keenest competition, as are others engaged in private business enterprises.

Indeed a construction of this act which would bring within its terms public hacks and draymen, for instance, would render it absurd and ridiculous, for it must be borne in mind that under the terms of the statute the size or responsibility of the concern engaged in the business to be regulated has nothing to do with the question of the jurisdiction of the Commission over that particular business. There is no distinction between corporations, persons and individuals, and a public hackman, a so-called night-liner, with one horse and one hack, or an ignorant expressman having the remains of one wagon and a horse for doing odd jobs, would come as well under the provisions of the act as the largest corporation doing a like business. Can it be conceived that Congress intended that the hack-driver or the poor expressman should, under the terms of paragraph 3, for instance, have the right to use for a reasonable compensation the "equipment" of any other concern doing a like business at the pleasure of the Commission; or that in compliance with paragraph 6 the Commission is required to determine the value of the night-liner's property and the amount of

his debts; or that such public hackman or ash-wagon driver, in compliance with paragraph 10 "shall be required to keep and render to the Commission, in the manner and form prescribed by the Commission, uniform accounts of all business transacted," that is to say, uniform with those of the Terminal Taxicab Company, Federal Taxicab Co., and others engaged in such classes of business; or that in compliance with paragraph 11 the "Commission should prescribe the forms of all books, accounts, papers and records required to be kept" by such public hackman or ash-wagon driver, and that such public utility should be "required to keep and render his books, accounts, papers and records accurately and faithfully in the manner and form prescribed by the Commission," etc.

The utter absurdity of this construction will doubtless be impressed upon the court when, with this idea in mind, they read almost any one of the succeeding paragraphs of this act. What rule, for instance, as to a "Proper and Adequate Depreciation Account" would the Commission adopt as a uniform measure covering the property of all the public hackmen in the city? These are not visionary and far-fetched illustrations. Beside the Terminal Taxicab Company there are, as is shown, in the City of Washington today many concerns and individuals doing not only the precise class of business done by the Terminal Taxicab Company, but individuals actually engaged in nothing but the business of public hackmen. One concern, for instance, has six taxicabs; another has two or three, and many of them have one public vehicle. The Commission has discriminated by regulating one and not the other, and will it also discriminate by adopting one standard for the Terminal Taxicab Company and an-

other standard for the individual hackman, or the owner of two or three or a half dozen vehicles, whom it may elect to regulate?

And what shall we say of paragraphs 72 and 73 as indicating the intention of Congress with respect to the classes of public utilities to be covered by the act? Is it conceivable that Congress intended to provide that a private corporation doing such business as that done by the Terminal Taxicab Company should be deprived of the power to "issue any stocks, bonds, mortgages or any other evidences of indebtedness payable in more than one year from date, until it shall have first obtained the certificate of the Commission showing authority for such issue from the Commission?" Or that the power to "create liens on corporate property" by such privately organized and financed concerns was "to be declared to be a special privilege, the right of supervision, regulation, restriction, and control of which is vested in the Public Utilities Commission of the District of Columbia?"

It would seem to be evident from the general scope and purposes of the act in question that it was never intended by Congress to apply to such concerns as taxicab or livery companies and proprietors. In brief, the act in question has no relevancy or pertinency to such concerns as the taxicab companies here and the character of the business in which they are engaged. The situation is just such an one as arose in the case of the *Omaha and Council Bluffs Railroad Company*, a street railroad owning and operating the street-car lines in Omaha and its suburbs, South Omaha, Benson, Dundee, and Florence, crossing the State line between Iowa and Nebraska. It was contended by the interstate Commerce Commission that because the road

was a common carrier of passengers engaged in interstate commerce, that it came within the provisions of the Interstate Commerce Act. The United States Supreme Court in a recent case decided June 9, 1913, and reported as Omaha & C. B. Ry. vs. I. C. C., 230 U. S., at page 324, say:

> * * * "The Omaha & Council Bluffs Railway, chartered as a street railroad under the laws of Nebraska, owned the street car lines in Omaha and its suburbs, South Omaha, Benson, Dundee and Florence. This street railroad had no right of eminent domain and was not authorized to haul freight, being limited by its charter to carrying passengers only. * * * Complaint having been made that certain interstate fares were unreasonable, a hearing was had before the Commerce Commission, which on November 27, 1909 (17 I. C. R., 239), ordered a reduction in the rate between Council Bluffs, Iowa, and points beyond the loop, in Omaha, Nebraska. * * *
>
> "On the argument of the appeal in this court, the sole question discussed was whether the provisions of the Commerce Act as to the railroads applied to street railroads. * * *
>
> "*The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad.*
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> "But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the decisions of the State courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads.
>
> * * * "For all recognize that while there is similarity between railroads and street railroads, there is also a difference. * * *

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines or under different municipal control. *When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887.* Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between states,' 'between states and territories,' 'between the United States and foreign countries.' The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in 'every depot, station, or office where passengers or freight are received for transportation.'

The railroads referred to in the act were not those having separate, distinct, and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchanges of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce.

"*Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads which did not do the business Congress had in contemplation and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit.* This was recognized in Willson vs. Rock Creek Ry. Co., 7 I. C. R., 83, where, although it was held that the statute applied to a street railroad between Washington, D. C., and a point in Maryland, the Commission nevertheless said (7 I. C. R., 83): 'It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads in their dealing with the public.' "

"Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad 'subject to the act' being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word 'railroad' cannot be construed to include street railroads."

If that act, which in its express terms was made applicable to "carriers engaged in the transportation of

passengers or property by railroad," could not be stretched to include street railroads, it is respectfully submitted that the general term "common carrier" used in the act in question cannot be stretched to include a taxicab company doing a private livery business, or for that matter any owner of a taxicab or similar vehicle for hire.

The Sheely case in New York (*supra*, 27 N. Y. S., 185), has been cited, and a few sentences particularly pertinent to the proposition there under discussion were quoted, but it is on the whole so important and illustrative, if not conclusive, as to all features of this matter that counsel take the liberty here of considering it more fully. In this case the court held that cabmen and hackmen were not only not common carriers under the ordinary meaning of the term, but did not come within the provisions of the act under consideration in that case which in many respects was very similar to the act in question here and which applied in terms to all "common carriers." An amendment to that act provided:

> "No preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings or upon its grounds, shall be granted * * * to any one of two or more persons, asociations, or corporations competing in the same business or in the business of transporting property for themselves or others.

And the court say:

> "The question arises whether the hackmen are 'common carriers' within the purview of the statute. The last clause must still retain the meaning

it possessed in the statutes from which it was derived. Regard must be had to the original statutes in determining the extent and scope of the present one. Do the words 'common carrier' apply as well to hackmen and draymen as to express, dispatch companies, shippers and forwarders? Was it intended by the legislature to place them all in the same category—carriers of persons and carriers of property, carriers of persons and property, upon and along the public streets and highways by means of horse and vehicle, and common carriers upon railroad cars? When the legislature speaks of common carriers in a statute regulating the transportation of persons and property by railroad companies, transportation, express or dispatch companies and shippers, is it proper to give to those words such an interpretation as shall embrace carriers of persons and property through and along the streets of a city in hacks, cabs or drays? We cannot conceive that the legislature intended to intermingle subjects so diverse in their nature and character in one sentence—the business of conveying goods or persons to and from the depots, and the business of transporting, forwarding or shipping property over railroads. It would be most unusual, in a provision designed to benefit or protect hackmen and draymen, to designate them simply as 'common carriers', without any other words or expression to indicate they were intended, and especially so when it clearly and unquestionably appears that the statute was primarily enacted for the protection and benefit of persons or companies engaged in the business of common carriers of property over railroad lines. Since there is considerable uncertainty in the books in respect to the application of the term 'common carriers' to licensed hackmen or draymen, we would not be justified in

holding or inferring that the law-making power intended to classify them with those who are clearly and strictly common carriers. To do so would be a very liberal interpretation indeed. The carriers within the legislative contemplation were carriers over and upon railroad lines, and not carriers using horse-power upon highways. We would not be justified in holding that the legislature, in enacting a law for the transportation of persons and property upon railroad cars, had also in mind carriers by means of horses and vehicles, in the absence of any expression indicative of such an intention. Such carriers do not come within the purview of the statute, but are extraneous to it. The business of carrying goods and persons to and from the depot does not come within the scope of a statute regulating transportation from town to town, from city to city. They are not common carriers, within the meaning of this statute, however proper it may be to impose upon them the liability of a common carrier, and to designate them as such; and in view of the uncertainty existing as to the acceptance of that term, it would be an unreasonable supposition that the legislature used it in this statute in such a sense. Indeed, the learned counsel for defendants were put to extended argument and the preparation of an elaborate brief to establish that hackmen may be properly called 'common carriers.' If the term 'common carriers' means 'draymen', this would enlarge the scope of the last clause, which had heretofore been used as meaning transportation over the railroads, and not as relating to conveying goods to and from depots. The court is asked to construe the statute so as to provide that hackmen and draymen shall be entitled to equal accommodation and facilities for the transaction

of their business in soliciting the patronage of the Company's passengers upon the cars, in the depots and buildings, and upon the grounds of the Company, and that no preference or advantage shall be granted to one over the other. To attempt to do this would amount to usurpation of legislative functions. We are unable to perceive that such a purpose was intended to be accomplished by the legislature merely from the use of the words 'common carriers,' or are we at liberty to draw such inference? If such a purpose was within the intention of the legislature, it is reasonable to suppose that appropriate words would be found to give it expression; *but here there is not the slightest reference in the entire section to the business of hackmen or draymen.* We are asked to give to the words 'common carriers' a comprehensive all-embracing meaning, so as to include carriers of all kinds and description who may have any business to transact upon the cars, in the depots, etc. 'We are "common carriers," ' say the defendants; 'ergo, we have a right to solicit business upon the Company's grounds or at least no preference shall be granted to any one or more hackmen in affording accommodation or facilities for such purpose.' But that business was not germane to the subject upon which the legislature was acting. It is not customary to speak of hackmen and draymen as 'common carriers,' nor even as 'carriers' in the strict sense given to those terms when speaking of railroads or vessels; nor do we think that they are ever so designated in statutes or ordinances.

"According to the position taken by defendants' counsel, the legislature has provided in one and the same sentence that no preference shall be given to one person or corporation engaged in the business of transporting property over railroad lines for

themselves or others as common carriers or otherwise in respect to the accommodations or facilities for the transaction of such business upon the cars, depots, or grounds, nor shall any preference be given to one hackman or drayman in the use of the cars, depots or grounds for soliciting the custom of passengers, etc. Is this a fair, reasonable or justifiable interpretation of the legislative expression? Surely there is nothing in the statute from which we can even infer or presume that the legislature intended to legislate upon the business of hackmen. The court has no power to recast the sentence and to insert the appropriate language. We must extract the sense from the words used and not inject sense into them by extending the scope of the statute beyond the particular subject-matter. When words have a definite and generally well-known meaning, the courts are not permitted to go elsewhere in search of conjecture to restrict or extend the meaning. McCluskey vs. Cromwell, 11 N. Y., 601."

In the case of Brown vs. N. Y. C. & H. R. R. R., 75 Hun. (N. Y.), 355; 27 N. Y. S., 69, the court also held that the term "common carrier" as used in the same act did not apply to hackmen.

Now it certainly cannot be successfully contended that the definition of a common carrier furnished by the act itself as "any agency for public use for the conveyance of persons or property within the District of Columbia for hire" would embrace the Terminal Taxicab Company and other private livery concerns, while it would not embrace licensed public hacks. While it is manifest from the general scope of the act that it was the intention of Congress to embrace neither it is certainly true that the language, vague as it is,

might be more fitly applied to the licensed hackman who is admittedly engaged in a public calling by reason of the fact that he has a license to ply his trade and solicit business therefor upon the public streets. Except for the fact that the general provisions of the act are not at all applicable to such modes of conveyance or lines of business as hacks, carriages, liveries, taxicabs, etc., and that Congress had previously passed such legislation as it deemed necessary for the control of miscellaneous vehicles on the public streets by the act of 1887 conferring the right of regulation and control thereover upon the Commissioners of the District of Columbia as such, the Public Utilities Commission might more reasonably have construed their organic act as giving them authority over such vehicles as licensed public hacks and hackmen. But inasmuch as Congress did by this prior legislation expressly confer jurisdiction over such public vehicles upon the Commissioners of the District of Columbia it cannot be assumed that by such general language as is used in the public utilities act it intended to repeal the prior legislation which was explicit.

A very similar question arose in the recent taxicab cases in New York City, the position there being exactly reversed. It was there claimed that the language of the act establishing the Public Service Commission, which provided that its jurisdiction "shall extend under this charter * * * to any common carrier other than a railroad corporation or street railroad corporation, operating or doing business within that district," applied to licensed public hacks and taxicabs, and that therefore the Public Service Commission of New York had exclusive jurisdiction over them, and that that act had repealed the former act constituting a part of the city charter which conferred

upon the Board of Aldermen the right to regulate hackmen and the rate of fare to be charged by them. But the Appellate Division of the Supreme Court of New York adopting the opinion of Mr. Justice Seabury said "such an interpretation not only does violence to that canon of statutory construction which holds that repeal by implication is not favored, but finds no support in anything contained in the act of 1913 referred to above (the Public Service Commission Act.)" And the court say further that the provisions of that act quoted above "do not justify the inference that the legislature intended to repeal sections 51 and 44 of the greater New York Charter which conferred in unequivocal terms the authority upon the city to enact ordinances regulating the business of hackmen."

In short, certain taxicabs in New York operating as public vehicles under a license from the city as public hacks, similar in all respects to licensed public hacks in this city and operating under an ordinance granting control over them to the city authorities precisely as did the legislation of 1887 here, maintained that the later legislation establishing a Public Service Commission, by reason of language strikingly similar to that in our act, had repealed the former and had placed them under the jurisdiction of the Public Service Commission; and this the New York court has denied.

Yellow Taxicab Co. vs. Gaynor, 143 N. Y. S., 279, affirmed in 144 N. Y. S., 299.

IV.

Who are Common Carriers?

The definition of the term "common carrier" as used in this act is in fact neither more nor less than the common-law definition of the same term.

It is held by the authorities that to be a common carrier the person or corporation must exercise the business of carrying as a public employment and must undertake to carry goods (or passengers) for all persons *indiscriminately*.

In the case of The Neaffie, 1 Abb. U. S., 465, Federal Case No. 10063, it was held that a common carrier is

> "one who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage."

And again, it has been held that

> "A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another, for all such as may choose to employ him."
>
> Page 35, Control of Public Utilities, Ivins & Mason.

In 6 Cyc. (Cyclopedia of Law and Procedure), page 364, we find the following:

> "A carrier is one who undertakes the transportation of persons or movable property, and the authorities, both elementary and judicial, recognize two kinds or classes of carriers, viz., private carriers and common carriers. While a common carrier has been defined as one who holds himself out to the public to carry persons or freight for hire, the term did not, at the common law, embrace a carrier of passengers, and is commonly confined to carriers of goods, as distinguished from common carriers of passengers. A private carrier is one

who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. A common carrier differs from a private carrier in two important respects: (1) In respect of duty, he being obliged by law to undertake the charge of transportation, which no other person, without a special agreement, is. (2) In respect of risk, the former being regarded by the law as an insurer, the latter being liable like ordinary bailees. * * *

(P. 639:) "But where the carriage is in pursuance of a special contract to serve one person only, the employment being therefore private and not public, the person so employed is not liable as common carrier."

Faucher vs. Wilson, 68 N. H., 338; 39 L. R. A., 431.

The distinction between common carriers and private carriers is that the former holds himself out to all persons who choose to employ him as ready to carry for hire, while the latter agrees in some special case with some private individual to carry for hire. The common carrier's employment is public, and he is bound to carry goods and persons of all who demand carriage and who comply with his reasonable terms.

Allen vs. Sackrider, 37 N. Y., 341, 342.

In the case of Meisner vs. Detroit, etc., Ferry Company, 19 L. R. A., (N. S.), 873, as to whether the defendant running a ferry boat between the City of Detroit and a pleasure resort on Belle Isle was a common carrier, the court say:

"Counsel do not disagree as to the law of common carriers of passengers. Anyone, no matter what his character is or has been, presenting himself for transportation to such carrier is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself to justify his exclusion."

Judged by this standard, the court held in that case that the ferry company was not a common carrier.

The distinction between common carriers and private carriers and the definitions of each are very concisely and clearly drawn and summed up by the United States Circuit Court of Appeals in the case of "Wildenfelds," 161 Fed. Rep., 864, and these definitions and distinctions apply with peculiar force to the case at bar. The court say (p. 866):

"But irrespective of these considerations we are of the opinion that the Rover was not *pro hac vice,* a common carrier. It is true that her owner was in the lighterage business and was in the habit of taking goods for any one who wanted lighterage done. She had, however, no regular route, did not carry between well-known termini, and, on the occasion in question, was engaged to carry, and had on board only, the jute of the libelant. She was not a general ship, but was employed for this business exclusively, no one else had a right to put a pound of freight aboard her. She became a private carrier and liable only as a bailee for hire. Her owner was under no legal obligation to carry this jute, he could have refused this and all other cargoes had he seen fit to do so and no liability would have attached to his refusal.

"In 1884, Judge Brown in Sumner vs. Caswell (D. C.), 20 Fed., 249, decided, following Lamb vs.

Parkman, 1 Spr., 343, 353; Fed. Cas. No. 8,020, that a ship hired for a specific voyage to carry a particular cargo for the charterers, is not a common carrier but a bailee for hire and bound to exercise only ordinary skill and care. This rule has recently been reasserted and affirmed by this court in the case of The Fri, 154 Fed., 333, 338; 83 C. C. A., 205, 210, where the court says.

" 'When a charter party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a carrier for hire.'

"Mr. Moore, in his work on carriers, says, at page 20:

" 'According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment to be such (is) that, if he refuses, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.'

"In Fish vs. Chapman, 2 Ga., 349, 353; 46 Am. Dec., 393, it was held that the liability to an action for a refusal to carry is the safest criterion of the character of the carrier.

"In Allen vs. Sackrider, 37 N. Y., 341, the Court of Appeals of New York, at page 342, says:

" 'The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Professor Parsons, "it seems to be clear that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a car-

rier, in such manner as to render him liable to an action, if he should refuse to carry for any one who wished to employ him.'' ''

"See also, as bearing on the questions involved, 6 Cyc., p. 365; 9 Am. and Eng. Enc. Law (2d Ed.), 237, 238; The Margaret vs. Bliss, 94 U. S., 494, 496; 24 L. Ed., 146; Bell vs. Pidgeon (D. C.), 5 Fed., 634, 638; affirmed (D. C.), 18 Fed., 192; Fish vs. Clark, 49 N. Y., 122; The Dan (D. C.), 40 Fed., 691.

"We are convinced that the rule in this country, at least in the Federal courts, is that a lighter, hired exclusively to convey the goods of one person to a particular place for an agreed compensation, is not a common carrier."

It is essential, therefore that the carrier must be found to be engaged in a public employment before it can be classed as a common carrier. What constitutes, therefore, public employment? Public employment is necessarily the opposite of private employment. If I am operating a street railway line or omnibus line, or indeed a hack line, between certain given points or along a certain route and the public are impliedly invited and are accepted as passengers from one point to another on such line, and where any person is at liberty to board such vehicle on its route and occupy any vacant seat or space, it is manifest that such a carrier is engaged in a public employment.

It is equally manifest that when an individual engages a cariage, whether it be a so-called taxicab or a horse-drawn vehicle or hack, for his exclusive and private use and to the exclusion of everyone else therefrom, and for the purpose of going where he will, the driver or owner of such carriage is in the private service of his patron. He cannot be compelled to accept

and carry other passengers; on the contrary his patron, who has engaged his exclusive services for the time being, could forbid his doing so and it would be a breach of his special agreement if he undertook to admit anyone else to the vehicle or to go otherwise than as directed by his particular passenger for the instant.

Again a public carrier of passengers may be defined as,

> "Such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing."
>
> Ga. Central Co. vs. Lippman, 110 Ga. 665; 50 L. R. A., 673.

It is held that those who carry passengers by means of stage coach, omnibus, steamboat or ferry are public carriers, as well as the elevators in certain classes of buiidings.

In two cases, each entitled Atlantic City vs. Dohn, decided in February, 1903, and reported in 69 N. J. Law Reports, at page 233, the question as to whether certain vehicles were common carriers was expressly raised and decided. In the first case, there was a conviction under an ordinance for refusing to carry passengers for legal fare. The conviction was set aside because it was not shown that the driver of an omnibus may not have been in private employ. In the second case, there was a conviction for refusing to carry a passenger and the proof was that the defendant was the driver of a "licensed 'bus." It was held that this did not, of itself, compel him to be a common carrier, and his conviction was also set aside.

The case of Trout vs. Watkins Livery Company, 148 Mo. App., 621; (130 S. W., 136), was an action for damages for breach of a contract of carriage. It was claimed that the defendant corporation was engaged in the livery business and of supplying carriages for hire in St. Louis; that the defendant agreed in consideration of $2 paid to convey the plaintiff in a carriage from a certain hospital to her home; that she entered the carriage and the driver undertook and started to convey her to her home, and that at a certain place the driver stopped the horses and abandoned its contract and refused to convey her further. In the course of the proceedings, as affecting the question of the right of the plaintiff to punitive damages, it became necessary to determine whether the defendant was a common carrier, and the Court of Appeals in its opinion say:

> "Defendant, in this case, is in no sense a common or public carrier of passengers, but, on the contrary, is the keeper of an ordinary livery stable. It does not hold itself out to serve any and all persons whomsoever, but instead, operates under a special contract and deals with such persons only as it chooses, identically as does the private carrier for hire in respect of goods. From this it is obvious that the obligation which attends its calling is not that of high care which obtains as to the public or common carrier of passengers."

Of such livery-stable keepers Mr. Hutchinson says:

> "Ordinarily, livery-stable keepers, engaged in the business of letting for hire teams and vehicles either with or without drivers, are not carriers of passengers within the legal meaning of that term.

> They do not hold themselves out as undertaking for hire to carry indiscriminately any person who may apply. *Those who hire their vehicles are not necessarily restricted to vehicles or drivers designated by the proprietor, but may, in a measure, protect themselves by selecting the particular horse or driver they wish to hire.* The duties and obligations of carriers of passengers are, therefore, not applicable to mere livery-stable keepers."

The case of Varble, etc., vs. Bigley (77 Ky., 698) was one in which the appellants were engaged in the towboat and jobbing business on the Ohio River and sued the defendants for agreed compensation for towing a certain coal-boat from Pittsburgh to a place called "The Pumpkin Patch." The coal-boat was lost and the defendants contended that as owners of the towboat the plaintiffs were liable as common carriers. The court says:

> "The authorities, both elementary and judicial, recognize two kinds or classes of carriers, namely: private carriers and common carriers."
>
> "All persons who undertake for hire to carry the goods of another belong to one or the other of these classes. * * * The former are not bound to carry for any person unless they enter into a special agreement to do so. The latter are bound to carry for all who offer such goods as they are accustomed to carry and tender reasonable compensation for carrying them; and if they refuse to perform their obligation in this respect they are liable to respond in damages."
>
> "Private carriers are such as carry for hire and do not come within the definition of a common carrier" (Angell on Carriers, section 46).

"* * * We take a common carrier to be one who offers to carry goods for any person between certain termini, or on a certain route; and he is bound to carry for all who tender him goods and the price of carriage, * * * These are essentials, and though any or all of them may certainly be modified, and, as we think, may be controlled by express agreement, yet if either of these elements is wanting from the relation of the party, without such agreement, then we say the carrier is not a common carrier, either by land or water" (Parsons on Shipping and Admiralty, vol. 1, page 245).

"A common carrier differs from a private carrier in two important respects: 1st. In respect of *duty*. He being obliged by law to undertake the charge of transportation, which no other person, without a special agreement, is. 2nd. In respect of risk, a common carrier is regarded by law as an insurer, etc." (Angell on Carriers, section 67).

"To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*" (Story on Bailments, section 495).

"Common carriers undertake generally, and for all *people indifferently*, to convey goods and deliver them at a place appointed, for hire, and with or without special agreement as to price" (2 Kent, 598).

In Fish vs. Chapman (2 Kelly (Ga. R.), page 353) the question was whether Fish was a common carrier. The court said:

"The undertaking (of the carrier) must be general and for all people indifferently. The undertaking may be evidenced by the carrier's own notice, or practically by a series of acts, by his known habitual continuance in his line of business. He must thus assume to be the servant of the public, he must undertake for all people."

And again:

"One of the obligations of a common carrier as we have seen, is to carry the goods of any person offering to pay his hire. With certain specific limitations this is the rule. If he refuses to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is perhaps the safest test of his character." See:

Jones on Bailment, 3d London edition, p. 103, D. Note.

"The liability of common carriers is upon contracts implied by law. No one can become bound by such contracts unless he has either consented to be bound in that character, or has so acted as to justify the belief that he intends to be so bound. Without actual consent or conduct, from which it can be presumed, no one can become liable as a common carrier any more than upon any other character of contract. * * * But in order to impress upon him the character and impose upon him the liabilities of a common carrier, his conduct must amount to a public offer to carry for all who tender him such goods as he is accustomed to carry. * * * But when he has not held himself out in such way as to amount to an offer to

carry for all shippers, no one has a right to depend upon him or to demand that, as matter of duty, he shall carry his goods, and he may refuse, though he has room to spare, and his charge for carriage be tendered.

"If he is bound to carry for all who offer, then he is a common—a public—carrier and whatever he receives as a common carrier, he is bound for in that character. * * * If he receives as a private carrier he carries and is liable in that character, and that only; he is bound according to the tenor of his contract. * * * Our conclusion then is, that a carrier of goods is not liable as a common carrier, unless he was under a legal obligation to accept the goods and carry them, and would have been liable to an action, if, without reasonable excuse, he had refused to receive them; and that he could not be liable to such an action unless he had *expressly and publicly* offered to carry for all persons indifferently, or had by his conduct and the manner of conducting his business, held himself out as ready to carry for all. * * * Tested by the principles we have laid down, it is clear the appellants are not chargeable as common carriers. They are not shown to have held themselves out to the public as ready to tow craft for all who might seek their services. They are engaged in a business which, in its nature, is not such as to entitle the public to suppose they would tow for all who might desire to hire them. *They are not shown to have operated on a definite route or between established termini.*"

The case of Brind vs. Dale, reported in 8th Carrington & Payne, 207, was one in which it was claimed that the defendant, the driver of a certain cart, whom the plaintiff employed to deliver certain goods, was a common carrier, and that he received the goods and

lost them. The defendant contended, among other things, that he was not a common carrier. It also appeared that the cartman plied for hire from a certain stand for carts in Thames Street, and owned 30 or 40 carts which were in the habit of standing near the wharves ready to be hired by any person who chose to engage them, either by the hour, day or job, the defendant being what is called, "A town carman." He was engaged by the plaintiff to move certain household furniture from one wharf to another. It was held that the defendant was not a common carrier.

In the case of Ross vs. Hill, 2 N. C. & S. (2 C. B.), 877, the defendant was the proprietor of a certain hackney carriage which stood and plied for hire at a certain place within the limits of the metropolitan police district of the City of London, to wit: the terminus of the Great Western Railway; that after the passage of a certain act of Parliament entitled, "An act for regulating hackney and stage carriages in and near London," the plaintiff hired the said hackney carriage to convey himself and his luggage, etc., to a certain place called "Gerrard's Hall," in the City of London, etc. In determining the question of the liability of the defendant for the loss of a certain part of the luggage it was conceded by the court, consisting of Tindall, C. J.; Coltman, J.; Crosswell, J., and Erle, J., that the defendant was not a common carrier and was not liable as such.

With respect to the implied invitation of the common carrier to the public to employ his services, it has been very pertinently said:

> "Now it might be said that the tradesman or artisan may indeed invite all to purchase his goods

or to employ his services, but this does not mean that any member of the public may, as a right, purchase those goods or employ those services and recover damages for the refusal of the merchant or artisan to transact business with him. * * * In the event of loss, he might and probably would maintain that merely holding himself out as being willing to transport chattels for all is very different from being legally obliged to serve all."

In the recent work of Moore on Carriers, the author states (page 20),

"The employment of a common carrier is a public one and he assumes a public duty, and is bound to receive and carry the goods of any one who offers, provided the goods be of the kind he professes to carry, and the person so offering agrees to have them carried upon the lawful terms prescribed by the carrier. * * * According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes, generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment is such, that, if he refuse without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action."

And again, at page 60, section 21, he says:

"Proprietors of hacks have been held to be common carriers and bound to exercise the utmost

care and skill. But whether the hackmen's business can be justly considered that of a common carrier under all circumstances has been questioned. It is said that he transports passengers here and there about the streets of a village or city, having no established route, nor any specified times for making his trips. He assumes the right to let his rig for a day, or for any other specified time, to suit the convenience or wishes of his patrons. He gives the exclusive use of his carriage to a less number of persons than it can conveniently accommodate. He pursues his business if he finds it profitable to do so; if not, he remains idle. The obligations and duties of a common carrier are very different." Brown vs. N. Y. C. & H. R. Co., 75 Hun., N. Y., 355; 27 N. Y. S., 69.

Again, elsewhere it is said:

"These cases undoubtedly state the law as it is settled in England and generally understood in this country; and it would seem clear that no one should be treated as a common carrier unless he has in some way held himself out to the public as a carrier, in such manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him in the particular kind of service which he thus proposes to undertake." Hutchinson on Carriers, 3d. ed., sec. 57, p. 53.

While the great weight of authority therefore is to the effect that even public hacks and hackmen are not properly classed as common carriers, there are one or two recent cases in which a public hackman has been apparently considered a common carrier for the reason that he enjoys a certain kind of monopoly growing out

of the privilege granted by the public to occupy a public stand and solicit patronage in the public streets.

One of these cases is Donnolly vs. P. and R. R. Co., 53 Pa. Sup. Ct. 78, in which it was held that a taxicab in which the plaintiff was riding and which had been hired at a public stand was a common carrier. The court say:

> "The name is a coined one to describe a conveyance similar to a hacking carriage operated by electric or steam power and *held for hire at designated places subject to municipal control.*"

And in the New York Taxicab cases (*supra*) the court says (p. 289):

> "The assumption of the plaintiffs that public hackmen are in the same class as those engaged in private business is without foundation and is contrary to fundamental principles embodied in the common law and in our present constitutional provisions. From time immemorial it has been held that the business of a public hackman is affected with a public interest and falls within the principle of the common law which was long ago asserted by Lord Chief Justice Hale in his treatise De Portibus Maris (Harg. Law Tracts, 78)."

It is important here however to note that the court clearly draws the distinction between the public hackman enjoying privileges in the public streets by reason of his license, and the private liveryman who must secure his trade through his private place or places of business and by special agreement or contract.

That there can be no question about this distinction the court say later (p. 298):

"In so far as the first objection is concerned it is a natural and just classification between those who solicit business upon the public streets and other persons who are engaged in the transportation of passengers for hire. The hackmen who ply the streets for hire are, because of that fact, engaged in a public employment which naturally and necessarily differentiates their position from that of private liverymen. In Professor Wyman's work on Public Service Corporations (volume 1, section 107) it is said: 'The hackmen who ply for hire have always been regarded as in the employment of the public. Theirs is really one of the most striking cases of temporary monopoly. In the case of any hackman his rivals may be around the corner prepared to make a fair price; and yet the traveller cannot bide his time he will often submit to an extortionate price rather than let a moment pass. For the time being the monopoly is effective, and therefore the necessity of regulating the business of hackmen upon the principles of public service law has long been apparent."

This latter is a most striking statement of the reasons underlying the city ordinances here and elsewhere regulating the business of public hackmen; that they do not apply to such concerns as the Terminal Taxicab Company which do not, and have no right to, ply for trade and solicit business in the public streets is perfectly self-evident. The concern which only lets its vehicles to such as apply for them at its private places of business and which must send its vehicles to those who seek them by telephone or otherwise, cannot possibly have such a temporary monopoly as is described by Professor Wyman. The very fact that the customer must send to the liveryman's place of business for

its vehicle prevents the monopoly described by him. The very fact that the city through its license permits the public hackman to ply on the street ready to serve the immediate and instant needs of the public on the streets justifies the regulation of the business and its charges. On the other hand, the man who has time to call upon a livery concern by telephone or otherwise for its service can select the one which he cares to patronize or who will give him the better service or charge him, if you please, the lower rates; in fact, he has the opportunity of making his own special agreement for his special service, and this is the class of business in which the appellant company is alone engaged.

Professor *Wyman*, in his very able work on Public Service Corporations and Others Engaged in Public Employment, recognizes and clearly points out the distinction not only between public and private carriers generally but between the public hack or taxicab and the private livery or automobile business. At sections 105 and 107, as pointed out in the New York Court in the taxicab cases he classifies public hackmen plying their trade and soliciting business upon the public streets as common carriers, or rather those engaged in the employment of the public, upon the theory that the instant needs of the public create a temporary monopoly as well as because of their public license to do business in the public streets, etc.

In his note to section 107, he says:

> "That hackmen are at the service of the public is generally recognized. * * * On the other hand liverymen who make no pretense of serving the public can bargain as they please."

See the following cases:

Iowa—Burlington vs. Unterkircher, 99 Iowa, 401; 68 N. W., 795 (1896).

Mass.—Copeland vs. Draper, 157 Mass., 558; 32 N. E., 944 (1893).

Mo.—Trout vs. Watkins L. & V. Co. (Mo. App.), 130 S. W., 136 (1910).

N. J.—Atlantic City vs. Dohn, 69 N. J. L., 233; 54 Atl., 220 (1903).

And again, in sections 186 and 187, he classifies public hacks and taxicabs as engaged in common carriage and says particularly with respect to taxicabs that "if they ply the streets for hire theyare undoubtedly holding themselves out as common carriers of passengers."

With respect to public profession as an essential element he says (section 200):

> "There is no complete case of public employment made out when the business is public in character if there has been in the particular case no profession to serve the public. The converse of this is also true, that there is no case of public employment if the business is private in character *however much eagerness to deal with the public may have been evinced.*"

And, again, at section 206, he says:

> "The opposite case where there is at the outset an express disclaimer of public service is equally plain. According to the general theory here developed, one gets into public service only by undertaking it voluntarily, and conversely one may keep himself out of it altogether by express disavowal of public employment."

And at section 295:

> "It is also clear from early authorities that a person who has once engaged in common carriage may withdraw from that public employment and may thereafter engage in private carriage without being held liable as a common carrier."

The Supreme Court of Tennessee in a recent and unreported case (Darnell, Admr., vs. Fidelity and Casualty Company) and without opinion, reversed a decree of the Chancery Court of Shelby County, which held that a taxicab ordered from a livery was a common carrier. The order of the Supreme Court was as follows:

> "This cause was heard upon the transcript of the record, and it appears to the court that in the decree of the Chancellor there is manifest error, this court being of the opinion that the complainant is not entitled to the relief sought. It is, therefore, ordered, adjudged and decreed that the decree of the Chancellor be reversed and the suit dismissed."

The statement of the case following was prepared from a certified copy of the records of the Chancery Court and inasmuch as it appears from this statement of the case that the only question presented at the trial and on the appeal was whether or not the plaintiff sustained the injuries resulting in her death while she was "in or on a public conveyance * * * provided by a common carrier for passenger service", it would appear that the Supreme Court of Tennessee was of opinion that under the facts detailed in the statement of the case the taxicab in question was not a common carrier. While this case is not authority,

counsel have taken the liberty of reproducing here the statement of the case as illustrating the case at bar.

> "The defendant issued to R. J. Darnell, individually, its policy of accident insurance, naming therein Mrs. Darnell, his wife, beneficiary. Among other provisions of the policy was one known as the beneficiary clause. This clause, so far as material to this action, provided that the beneficiary was insured against bodily injury sustained through accidental means by her 'while in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service' and in case of her death therefrom $10,000 was to be paid her estate.
>
> "The complainant charged that Mrs. Darnell was instantly killed October 1, 1911, while riding in a taxicab and that said taxicab was a public conveyance provided by a common carrier for passenger service. The defendant denied that Mrs. Darnell was at the time of sustaining the injuries, resulting in her death, 'in or on a public conveyance (including platform, steps or running board thereof) provided by a common carrier for passenger service.'
>
> "The only question presented at the trial and on the appeal was whether or not Mrs. Darnell sustained the bodily injuries, resulting in her death, while she was 'in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service.'
>
> "The defendant rested its case upon the proof of complainant. The Chancery Court decreed in complainant's favor.

"On October 1, 1911, at Freeport, N. Y., while Mrs. Darnell was riding in a taxicab or automobile and crossing the railroad tracks in that place, said taxicab or automobile was run into by a train, and she was instantly killed. The car was owned and operated by the Freeport Taxicab Company, a New York corporation, organized for various purposes, including among other lines the conducting and carrying on of a general passenger, baggage and freight transfer business in Freeport and elsewhere in the State of New York, and to do any and every act or thing that may be appurtenant, incidental to, or necessary in connection therewith.

"Mrs. Darnell, with her two daughters was visiting at the residence of one Collier in Freeport. They desired to take a train for New York leaving at about 7 o'clock in the evening. It was a dark, rainy night. Mr. Collier telephoned to the Freeport Taxicab Company shortly before train time and asked that company to send a closed taxicab to his residence to take four passengers to the train. He had frequently used this company's taxicabs before for this purpose, and the regular charge to him had always been 25 cents per person. The company sent an automobile seating five to six passengers, with chauffeur, as it had been requested, and deceased, her two daughters and Mr. Collier's son entered the cab for the purpose of being taken to the railroad station. It was necessary to cross the tracks of the railroad to reach the platform of the station to take the train going to New York, and while so crossing the accident occurred.

"The Freeport Taxicab Company had at the time five cars—limousine, touring and town cars. It employed two chauffeurs, and sometimes, when it was necessary, the president and general manager acted as chauffeur. It had been in business for some years with its place of business near the railroad station. Through advertisements in newspapers and by printed cards, it gave its address and telephone number, that it had 'taxicabs and touring cars to hire,' gave the rates within the village limits for transportation of persons, the price per hour for the cars, and that it had special rates for day or trip. The people of Freeport were largely commuters to and from New York City. The company would send upon call or by appointment its taxicabs to points in and about the village for the purpose of carrying persons to or from the depot, hotels and residences, or from one residence to another, or to and from the station, or between other points within the village limits, or to places beyond such limits if that was necessary. In doing this it charged a rate, fixed by the company, alike for all passengers. It admitted to its cabs all persons applying if they paid the compensation—some might be excluded if disagreeable to the other passengers. The company reserved to itself this right. It excluded persons form the use of its cars only for want of the fare. Any person might hire a car or all its cars if he or she had the money to pay therefor. It undertook to carry and did carry all persons who applied for transportation 'if they had the price.' Any member of the public who so desired and had the necessary funds could be transported or hire a car or all the cars. On the day of this accident the

company offered to and would have hired out to any person or persons 'having the price' the car being used at the time of the accident or all its cars. It at times did let this very car out by the day to persons who paid the price agreed upon for the trip or service desired. This applied to all its cars. If all the cars were in service when an application was made for one, the applicant would not be served. If persons were in the cabs additional persons, if acceptable to the persons already passengers, would be taken in whatever their destination might be. The company had a standing arrangement with some people to call at their residences or hotels and take them to trains. This was was the usual and customary way in which the company had carried on its business for about three years, including October 1, 1911.

"It was well known throughout Freeport that it had taxicabs for general public hire by the trip, hour, day or longer if desired for those willing to pay therefor, and the company so held itself out to the public. The speed of operation was under the control of the chauffeur, but he would accept suggestions from the passengers. If the terminal point was all that was designated the chauffeur would take the shortest or most desirable route. He would accept as to this suggestions for variations from the passengers. The company would let out a car or all its cars by the day or hour, as might be agreed upon, to any person who would pay the charge therefor.

"No car would have been sent to Mr. Collier's residence at the time mentioned unless it had been so requested. Sometimes because of the depth of snow and mud it was impossible to operate the

cars, and at such times the company's service was suspended. Its place of business was kept open a good part of the night and one of the chauffeurs stayed there all night. The chauffeur on the occasion in question was not told what route to take nor to hurry up to the train, but was cautioned to be careful on account of the dark and stormy night. He had no discretion as to fares to be charged. These were regulated by the company.

"For at least a year it had been usual and customary for the company to send taxicabs at Mr. Collier's request to meet passengers at trains, and to hotels and residences for him and others, for the purpose of transferring passengers. In case of a trip Mr. Collier designated the point as the station or hotel, but when he hired by the hour or longer he directed the route and sometimes changed it. He had on occasion stopped the company's cars, gotten in, rode to the depot when at the time there were other passengers in the car going to the same destination. He had never known anyone to be refused such course of action. He paid the usual price per person for the trip in which Mrs. Darnell was killed.

"The business was described by the company's president as in the nature of a livery stable business with the exception that it had motor cars operated by gasoline instead of horses and carriages. It affirmatively appeared that cabs were not operated by the company on any defined route, or between given points, had no regular schedule, no defined daily route, no special route, no set time for making trips upon any schedule, no daily route between any given points at any given time of the day, no established daily or hourly route, and nothing to distinguish the cars from any other of the same make but the license

number. The evidence given in general form as to the company's course of business was testified as applying to October 1, 1911, the date when Mrs. Darnell was killed.

"The complainant in his printed brief cited the case of Primrose vs. Casualty Company of America, 232 Pa. 210, Ins. Law Jour., as sustaining the judgment he had obtained, quoted the opinion therein in full and asserted it was controlling, and as the only issue of that character by a court of last resort in any State. Defendant in its brief argued that the Primrose opinion had no application to the present case; that all that was there decided was that the taxicab, under the evidence therein was a public conveyance within the provisions of that policy; that the clause in that policy did not limit the character of conveyance to one 'provided by a common carrier'; that the same court in Conn. vs. Hunsberger, 224 Pa. 154, had decided that the relation of a livery stable keeper and his customer is that of bailor and bailee for hire, requiring the exercise of reasonable care by the former, and had cited Stanley vs. Steele, 77 Conn. 688, which held that a livery stable keeper was not a common carrier; that if the court had intended to or did hold that the taxicab in the Primrose case was provided by a common carrier, which it did not, it would have been necessary for it to discuss and overrule its decision in Conn vs. Hunsberger, and that the distinction between the Primrose policy and the policy herein was expressly adverted to by the late United States Supreme Court Justice Lurton, in Aetna Life Ins. Co. vs. Frierson, 114 Fed. 56, 66, where, speaking for the Circuit Court of Appeals, he said that if the company, whose policy limited the specific indemnity to injuries sustained 'while

> riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power,' intended to limit benefits of its contract to passengers who travel 'in conveyances operated in the usual lines of travel as common carriers,' it should have so stipulated but it did not; defendant submitted it had done so in the policy herein."

See also:

> Forbes vs. Reinman & Wolfert (Sup. Ct. Ark., Apr. 1914), 166 S. W. 563.
> Lanning vs. Boockholdt (Ala.) 65 So. 430.
> U. S. vs. La. & P. R. Co., 234 U. S. 1, 24.

The cases upon which the Public Utilities Commission rely, refer expressly to the business of licensed public hackmen, between whom and the private liveryman there is drawn a vital distinction, and neither refer nor apply in any sense to the character of business here under consideration.

V.

Is the Terminal Taxicab Company a Common Carrier Within the Terms of the Act.

What has just been said clearly points out the distinction between the public and the private carrier, between the public hackman and the liveryman, between the licensed public taxicabs in the City of Washington and the vehicles of the Terminal Taxicab Company and other similar concerns engaged in automobile livery business.

That the appellant Company belongs in the class of liverymen and not in the class of public hackmen is conclusively shown by the agreed statement of facts in this case. It is conceded that they have no public hack licenses; that they do not ply for hire or solicit trade upon the public streets; that none of their vehicles have at any time displayed any "For Hire" signs or other indications that they were for hire to the public (R., p. 35); that they do not use the public hack stands of the city; that they can be engaged only by applying for them either in person or by telephone at the Company's main or branch garages or through the hotels which they engage [by contract] to serve; that in every instance where the agents of the Commission stopped one of these vehicles on the public streets and attempted to engage it they were told by the driver that it was not a public hack and could not be hired except by communicating with the garage; that they are not held out to the public for use as public vehicles, but on the contrary every one dealing with them is notified that they are private and not public carriers. These are the essential features distinguishing the public from the private carrier and every one of them is admitted or conclusively proved.

It also appears, as conceded, that the management of the appellant Company is strictly enforcing the private nature of its business (R., p. 34, 36, 37, 38), and that in its effort in good faith to carry out this intention and to avoid a breach of the law by infringing upon the rights of public hackmen it has in two instances at least discharged drivers who solicited business upon the public streets (R., p. 34), and that in order to emphasize the private character of its business it places upon all of its vehicles while in the service of the hotels

by which it is employed a conspicuous sign indicating that the vehicles are for "GUESTS AND PATRONS OF THIS HOTEL ONLY." It also appears that the Company has taken the precaution, upon learning that these regulations upon hiring cabs at such places to persons other than guests or patrons had been violated in certain instances, to require that before one of its vehicles can be engaged at any of the hotels either the intending passengers or some one connected with the hotel who knows the fact must sign a certificate on the back of the driver's service check that the service is for a guest or patron of the hotel.

The fact that certain of its employees in a few sporadic instances and individual cases have violated the instructions under which they operate, and have yielded, not through their own initiative, but at the suggestion of others who sought them out, to the temptation to accept business which they knew that they were not permitted to perform, is scarcely sufficient evidence to justify the Commission in finding that the Terminal Taxicab Company holds itself out to the public as engaging to carry all such persons indiscriminately as may choose to employ it; that it is engaged in the business of a common carrier. As well might we say that it is engaged in the business of a "common thief" because forsooth one of its employees may have stopped to pick up a five-dollar bill that has been temptingly placed within his reach. Might it not as well be said that the Company is a "public nuisance" because one or two of its drivers, in violation of its rules, are here and there found to be violating the police regulations with regard to speed or any of the other numerous traffic regulations of the District of Columbia? The character of the

business in which the Company is engaged is not to be measured or determined by the exceptional instances in which its employees go outside of its customary and proper functions and engage in unauthorized, if not illegal, pursuits.

One cannot lawfully engage in the public hack business in the District of Columbia without paying the license tax provided therefor. It is certainly not to be presumed that any man will deliberately, knowingly, and purposely violate the law. The Terminal Taxicab Company deliberately and purposely surrendered its public hack licenses and elected not to engage in that class of business. It could not thereafter lawfully engage in the public hack business and it knew that it could not lawfully engage in that business. Is it to be presumed that the Company intended and still intends to deliberately engage in such business in defiance of the law and against its own express election? Is it not, on the contrary, to be presumed that the few instances in which individual employees have been found violating the law and the instructions of their employer are just such cases as will constantly occur in every community where individuals will be found committing crimes, misdemeanors, and infractions of regulations in spite of the most vigilant and painstaking efforts on the part of both public officials and employers to prevent such acts?

The attempt has been made to show that this Company does not discriminate as to the persons it will or will not carry. So far as the fact is concerned, it not only appears that it does discriminate and refuse services for many reasons which may or may not be reasonable, but it also appears that it has on occasions arbitrarily discriminated; that it has sometimes car-

ried colored people, and on other occasions arbitrarily refused to carry them; that when it does not wish the employment offered it diplomatically declines the employment. (R., 37.) Indeed the testimony of Captain Schley and Mr. Williams is to the effect that some of the drivers would accept their employment, while others under precisely similar circumstances would not.

When we come to consider the matter of the Company's advertising as indicating the character of the business in which it is engaged and which it is offering to do, we find that in no instance is it offering to do the business of a public carrier of passengers. So far as its principal and best known advertisement is concerned, that on the back of the local telephone directory, as well as all others for that matter, it would appear that the only way to secure one of its vehicles is by telephoning to or otherwise making arrangements with its garage, 1231 20th street northwest, telephone North 1212. Nowhere in such advertising is the public informed that the vehicles of this Company can be engaged upon the public streets or for that matter even in the hotels.

That the livery service for which the hotel contracts as in this case is strictly a private service and not such as the public has an interest in, is clearly shown by the following:

> "Likewise in respect to private services of all sorts, the innkeeper owes no duty to his guests and may therefore enter into such exclusive arrangements as he pleases with those who to wish carry on such business with guests. In a leading case in North Carolina it was held that a proprietor of a hotel could exclude from his premises a drummer for a livery stable, as he had entered into an exclu-

sive arrangement with one livery stable which had an office there. 'An innkeeper has unquestionable right to establish a news stand or barber's shop in his hotel, and to exclude persons who come for the purpose of vending newspapers, or books, or soliciting employment as barbers; and in order to render his business more lucrative he may establish a laundry or a livery stable in connection with his hotel, or contract with a proprietor of a livery stable in the vicinity, to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses, from dealing with the patrons of the public house.' "

Wyman Pub. Serv. Corp., section 499.

There seems to have been some misapprehension as to the the so-called rights to the use of the streets by the taxicab companies, said to be granted to them by the hotels. No such right is granted, nor well could be granted. The taxicab companies, as such, have no rights whatever differing from those of the general public in the use and occupation of the streets. Only in so far as it may be necessary or proper for their vehicles to be at the hotels for the purposes of prompt and efficient private livery service to the hotel, its patrons and guests, under their agreements so to do, have they any right to be there at all. As distinguished from that of the general public the hotel cannot and does not undertake to give them any exclusive or even preferential use of the streets, at least so far as the Terminal Taxicab Company's contracts are concerned, but merely requires that the Company shall provide a prompt, efficient and sufficient service.

So far as its contract with the Washington Terminal Company is concerned and the service which it thereby supplies at the Union Station, it is such a private service under the complete control of the Washington Terminal Company as is sanctioned by law in the line of cases of which Donovan vs. P. R. R. Co., 199 U. S., 279; 50 L. Ed., 192, is the leading and conclusive authority. In that case as in this, the owner of the railroad station had provided a private cab or livery service which it conducted on its own premises for the use of those who patronized its station in order that it might exercise complete control over the character of service performed and in order that those needing such service at the station might be protected against annoyance, disturbance, extortion, and the possible violence of the public hackmen who congregated in the neighborhood and over whom it could exercise no discipline or control. This, the Supreme Court of the United States say, was an entirely proper thing to do and even though the railroad made a profit out of the livery business it was entirely within its legal rights (p. 295), and the court say further:

> "But if (the arrangement referred to) was inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company."

And again:

> "But in a real substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property."

Whether the appellant Company in this particular instance as the agent of the Washington Terminal Company is engaged in the business of a common carrier is of no moment here because as is stated explicitly by the Supreme Court of the United States in this Donovan case whatever its business or service is, is the business or service of the railroad company (in this instance, the Washington Terminal Company), and the business of the Washington Terminal Company is expressly excluded from the jurisdiction of the Public Utilities Commission.

Indeed the court in criticising the case of Pa. Co. vs. Chicago, 181 Ill., 289, say:

> "The sole issue in that case was as to the validity of certain ordinances of the City of Chicago relating to the use by hackmen of the public street and sidewalk in front of the Company's station,—a question wholly different from the one relating to the special arrangement between the railroad company and the Parmelee Transfer Co."

VI.

If the Act is to be Construed as Permitting the Commission to single Out the Appellant Company for Regulation and Control from Among Others of the Same Class, it is Unconstitutional and Void.

We have hereinbefore taken the position that there is a valid and vital distinction between the public hackman and the character of business conducted by the appellant Company. This position, however, is entirely consistent with the proposition that if in view of the fact that the statute itself draws no such distinction and in spite of that fact, the Commission may, and does,

under its terms, draw such a distinction and single out the appellant Company and a few other similar concerns for the exercise of its jurisdiction, control and regulation, and neglects and refuses to assume jurisdiction or to exercise control over others in the same class and such as would equally with the appellant Company come within the language of the act (if either might be so classed), then their actions and proceedings in this connection and any act purporting to permit such actions are unconstitutional and void as depriving the appellant Company of its property without due process of law and as taking its private property for public use without just compensation and as denying it the equal protection of the laws of the United States. In support of this contention we need only cite the following cases:

Yick Wo vs. Hopkins, 118 U. S., 374; 30 L. Ed., 226.

Williams vs. Mississippi, 170 U. S., 225; 42 L. Ed., 1016.

Cotting vs. Goddard (stock yard case), 183 U. S., 79; 46 L. Ed., 92.

IN CONCLUSION.

For these and many other obvious reasons it is respectfully submitted that the Terminal Taxicab Company is not a common carrier, either under the usual or common law definition of the term, or under the definition prescribed by the Public Utilities Act, and that it is equally obvious from the language of the act itself and its unmistakable purposes that regulation under its terms of such private business enterprises as the Terminal Taxicab Company and other livery-

men, draymen, etc., was not contemplated nor intended by Congress.

The decree therefore should be reversed and the court below directed to enter a decree enjoining the Public Utilities Commission from exercising jurisdiction over the appellant Company.

Respectfully submitted,

G. THOMAS DUNLOP,

Attorney for the Terminal Taxicab Company, Appellant.

IN THE

Supreme Court of the United States

October Term 1915.

No. 348.

TERMINAL TAXICAB COMPANY, INCORPORATED, *Appellant*,

v.

CHARLES W. KUTZ, ET AL.

ADDITIONAL AUTHORITIES CITED BY APPELLANT.

Counsel for the appellant desires to call to the attention of the Court the following cases which have come to his notice since the argument in this cause:

ILLINOIS PUBLIC UTILITIES COMMISSION.

J. W. NEWCOMB, ET AL.,

v.

YELLOW CAB COMPANY.

[No. 4122.]

PUBLIC UTILITIES—TAXICABS—CERTIFICATE OF CONVENIENCE AND NECESSITY.

Taxicabs not operating over specified routes under schedule or between definite points are not public utilities within the meaning of the Public Utilities Act and do not require a certificate of convenience and necessity.

[February 3, 1916.]

Complaint by common carriers of persons that the Yellow Cab Company, who was operating taxicabs, was doing business without a certificate of convenience and necessity; dismissed.

By the COMMISSION: James N. Newcomb and August Schrader filed the complaint herein, stating that they are engaged in the business of common carriers of passengers for hire, on the streets, roads, and highways of the city of Chicago, in the State of Illinois, and that they have filed with this Commission a schedule of rates and charges under which they are *rendering service as common carriers.* They further state in their complaint that the defendant is a corporation incorporated under the laws of Illinois as the "Yellow Cab Company," and that said corporation is operating within the city of Chicago a great number of taxicabs for hire, and that said corporation has not applied for nor obtained a certificate of convenience and necessity from this Commission.

The complainants further aver that by the act of the legislature of the State of Illinois entitled "An Act to Provide for the Regulation of Public Utilities," that said corporation should first obtain a certificate of convenience and necessity before engaging in any *business of carrying passengers for hire in the city of Chicago.*

Complainants further aver that the Yellow Cab Company is a public utility within the meaning and contemplation of said act, and charge that the defendant is operating in violation of the law, and also to the detriment and damage of the complainants. The complainants ask that this Commission cause notice of this complaint to be served upon the Yellow Cab Company, according to law, and ask that upon a hearing of the matters contained in this complaint that this Commission will direct its counsel to commence appropriate action in the Circuit Court of Cook County to prevent the continued violation of the law, as alleged in their complaint.

The complainants and the defendant appeared before the Commission, and at the hearing an objection was made

as to the sufficiency of the petition or complaint, such objection, being in the nature of a demurrer to the complaint. The defendant, by the objections or demurrer, admitted the allegations of the complaint, but denied their sufficiency in law to require an answer on the part of the defendant, and it was agreed between the parties that the case should be argued upon the law as to the sufficiency of the complaint. Oral argument was presented by the counsel for both parties, and subsequently they filed written briefs to support the theories presented by the respective counsel as to the law governing the case.

It is insisted by the complainants that the Yellow Cab Company is a public utility, for the reason that it serves the public for hire, and that the character of the service rendered by the Yellow Cab Company stamps it as a public utility, as defined in the act mentioned. Under the complaint and the objections filed to it the question is directly raised as to whether or not a carrier of passengers for hire, operating generally within the city of Chicago, brings the operation of such vehicle within the meaning of the law relating to public utilities. It is not claimed that the Yellow Cab Company is operating within the city or State between any given points.

Loosely regarded, the Yellow Cab Company might be considered a public utility or a common carrier, but in order that a common carrier may be brought within the terms of the act requiring the regulation of public utilities there must be something in addition to a public service rendered and a compensation paid therefor. The act itself seems to contemplate that a public utility in the nature of a common carrier of passengers for hire must operate upon a schedule not only of rates or charges for the service, but also between fixed and definite points.

As defined in Section 10 of the act, the term "public utility" includes "every corporation, company, association, joint stock company or association, firm, partnership, or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any municipality) that now or hereafter:

"(a) May own, control, operate, or manage, within the State (directly or indirectly for public use, any plant, equipment, or property used or to be used for or *in connection with the transportation of persons or property, or the transmission of telegraph* or telephone messages between points within this state; or for the production, storage, transmission, sale, delivery, or furnishing of heat, cold, light, power, electricity, or water; or for the conveyance of oil or gas by pipe lines; or for the storage or warehousing of goods; or for the conduct of the business of a wharfinger; or that

"(b) May own or control any franchise, license, permit, or right to engage in any such business."

In the case of Jacksonville R. Co. v. O'Donnell, which was decided by this Commission and reported in the P. U. R. 1915C, page 853, this Commission held that the language used in the act—"between points within this state"—had a definite meaning, and was to be regarded in determining the question of whether or not the so-called "jitney" service, automobile service, or taxicab service, in the carrying of passengers for hire, should be regarded as service by a public utility under the act. We there held that the fact that the defendant in that case was operating motor buses over and along certain designated streets in the city of Jacksonville, with definite routes, at specified rates of fare and under a time schedule, brought the defendant clearly within the meaning of the act and consti-

tuted the business in which he was engaged, that of a public utility.

In the case under consideration, however, there is a complete absence of averment that the Yellow Cab Company is operating over specified routes under a specified schedule as to time, or between certain definite points.

The Commission is clearly of the opinion that the complainants in this case fail to show such a state of facts as would justify this Commission, under the law, to assume jurisdiction over the defendant, and that the complainants have failed to state such a case as would warrant this Commission in directing its legal representatives to proceed against the defendant on the ground that it is conducting a business contrary to law. The character of the business, so far as appears from the complaint in this case, is not such as to require the defendant to first obtain a certificate of convenience and necessity from this Commission before engaging in such business.

It is therefore *ordered* by the Commission that the complaint herein be dismissed.

By order of the Commission at Springfield, Illinois. Dated this 3d day of February, 1916.

NOTE.—Relying upon the authority of Newcomb *v.* Yellow Cab Co. and Jacksonville R. Co. *v.* O'Donnell, P. U. R. 1915C, 853, certain vehicles were held by the Illinois Commission *in re* Hughes, No. 4159, March 10, 1916 (hacks or taxicabs) and in Southern Illinois Light & P. Co. *v.* Norton, No. 4009, March 10, 1916 (jitneys with no fixed routes, termini, and regular schedules, and often hired by private contract) not to be utilities within the meaning of the Public Utility Law, and therefore not to require certificates of convenience and necessity.

Public Utilities Reports, Ann., Volume 1916B, 983, Advance Sheets April 13, 1916.

NEW YORK PUBLIC SERVICE COMMISSION. SECOND DISTRICT.

In Re Ryder.

[Case No. 5219.]

Statutory Construction—Automobiles—When Subject to Jitney Law.

Chapter 667 of Laws of 1915 (New York), governing the operation of jitneys, is not applicable to automobiles standing at a hotel and railroad depot for hire to and from any points indicated by a customer, for a minimum fare of 25 cents, although the demand for service between the hotel and depot requires more or less regular trips along streets occupied by a street railway.

[January 20, 1916.]

Complaint that Harry Ryder was operating automobile buses and vehicles in Olean contrary to the provisions of Chapter 667 of the Laws of 1915; dismissed.

By the Commission—: The Western New York & Pennsylvania Traction Company informed the Commission that the respondent was operating automobile buses and vehicles in the city of Olean contrary to the provisions of Chapter 667 of the Laws of 1915. An order to show cause was made, to which an answer was filed and a hearing held in the city of Olean. On the hearing it appeared without contradiction that the respondent owns several automobiles which he operates for hire in and about the city of Olean. He has what is called a "stand" in front of a hotel, and he maintains at that point a telephone. He responds to calls by telephone and otherwise, and carries passengers from point to point within the city where and when they so desire. It is also his practice to have an automobile at the Erie Railroad station, something more

than a mile from the center of the city, upon the arrival of the important trains. This car picks up passengers and carries them to any point to which they desire to proceed. His minimum fare is 25 cents. In other words, *he is performing a regular taxicab business with a minimum 25-cent charge.* The only semblance of regular operation or regular route arises from the fact that many passengers desire to go between the Erie Railroad station and the hotel. This leads to a somewhat regular operation between these points and along a street occupied by the Western New York & Pennsylvania Traction Company. The Act of 1915 is certainly broad in its provisions, but it does not cover this method of operation. The respondent is not operating a bus line, a stage route, a motor vehicle line or route, or any vehicle in connection therewith. He is not operating any vehicle carrying passengers at a rate of fare of 15 cents or less for each passenger. *If, then, he is violating the law, it must be because he is operating vehicles carrying passengers in competition with another common carrier which is required by law to obtain the consent of the local authorities of the city.* To construe this operation as falling within the last designation would bring within the operation of the law in every city in which street railways operate every *liveryman, every operator of taxicabs, and even private vehicles, because under this construction the rate of fare or the existence of a fare would be unimportant, the only test being competition.* The Legislature could not have so intended. It is therefore

Ordered that the case be and the same hereby is dismissed.

NOTE.—*In re* Derby, Case No. 5220, January 20, 1915, a complaint based upon facts in all essentials the same as those *in re* Ryder, Case No. 5219, was dismissed for the same reasons.

Public Utilities Reports, Ann., Volume 1916B, 1067, Advance Sheets, April 13, 1916.

Respectfully submitted with consent of counsel for appellee.

G. THOMAS DUNLOP,
Attorney for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 348.

TERMINAL TAXICAB COMPANY, INC., A BODY CORPORATE, APPELLANT,

vs.

CHARLES W. KUTZ, OLIVER P. NEWMAN, AND LOUIS BROWNLOW, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, CONSTITUTING AS SUCH COMMISSIONERS THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, APPELLEES.

BRIEF FOR APPELLEES.

CONRAD H. SYME,
General Counsel, Public Utilities Commission,
Attorney for Appellees.

LIST OF CASES CITED.

IN THE

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BRIEF FOR APPELLEES.

The only question for determination in this case is whether the Terminal Taxicab Company, by reason of the nature and character of its business, is within the jurisdiction of the Public Utilities Commission and subject to its orders under the Public Utilities Law. The question as to whether it is a common carrier in its limited technical definition is not before this court.

The Public Utilities Law (act of Congress approved March

4, 1913, sec. 8, public, No. 435) requires every public utility doing business within the District of Columbia to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charges made by it are required to be reasonable, just and non-discriminatory, and it is required to obey the lawful orders of the Public Utilities Commission, the purpose of which is to carry into force and effect the objects of this law. What particular utilities are to be deemed public utilities as understood by this law are carefully defined by it. It says "the term public utility as used in this section shall mean and embrace every street railroad, street railroad corporation, *common carrier,* gas plant, gas corporation, electric plant, electrical corporation, water-power company, telephone corporation, telephone line, telegraph corporation, telegraph line, and pipe-line company." With particular reference to its use of the term "common carrier" as above, the law continues, "the term 'common carrier' when used in this section includes express companies, and every corporation, street railroad corporation, company, association, joint-stock company or association, partnership, and persons, their lessees, trustees or receivers appointed by any court whatsoever owning, operating, controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire." It would be perhaps almost impossible to imagine a more extensive definition of the term "common carrier." It was the manifest intention of Congress specifically to place within the regulatory power of the Public Utilities Commission all agencies which, under present modern urban conditions, are "for public use for the conveyance of persons or property within the District of Columbia for hire."

The question thus arises as to whether the Terminal Taxicab Company is an agency which for public use conveys persons or property within the District of Columbia for hire. If it is, the jurisdiction to control and regulate its rates

and service in the public interest is placed by law in the Public Utilities Commission.

It is respectfully submitted that the court might almost take judicial notice of the public nature of the business of the Terminal Taxicab Company. The record shows that it operates 75 vehicles, and perhaps more. Its advertisements appear on the pages of the Washington daily newspapers, in which it solicits business from the public openly, broadly, and without reservation. The local theater programmes contain similar announcements and the entire back page of the telephone directory is devoted to holding out its public service to the citizens of the District of Columbia and to the strangers within our gates, indiscriminately and unreservedly.

The Terminal Taxicab Company is chartered under the laws of Virginia, with the broad power, among other things, "to transfer, carry, and transport by means of its taxicabs, etc., passengers, goods, baggage, merchandise, and other personal property from or to any points or places in the United States or elsewhere; *but not to exercise any of the powers of a public service corporation*" (R., p. 3). (This innocent reservation is adverted to elsewhere.) It maintains its own repair shops and sometimes builds cars (R., p. 40). It has its contracts with the Washington Terminal Company, hotels, clubs, department stores, turkish baths, private schools, etc., and these contracts are not in any sense rental contracts. It carries indiscriminately, under a contract with the Washington Terminal Company, all persons who in any way use the Union Station (R., p. 30). In the year 1913 it made over 203,000 service trips (R., p. 41), and it may be safely assumed that last year it carried over half a million passengers. Its contracts with certain hotels enables it to occupy public space in the public streets to the exclusion of all competition, and it makes no discrimination between actual guests of the hotels and one who passes through their lobbies (R., pp. 36, 38). The Public Utilities Commission

made a thorough test of the sincerity of its hotel contracts and found they were simply a blind. Record pages 34 and 35 show these tests and that accommodation was time and again extended to agents of the Commission who approached these taxicabs and secured their service when neither the direction from which they came nor anything about them indicated that they were guests of the hotel. Its contracts with the hotels were not contracts for the rental of its cabs in any respect. These cabs were not rented at all. Nothing was paid to the company if the cabs were not used. If the cabs were used, the final result of the contract was that the hotel proprietor took a commission of ten per cent of the fare. These contracts were for the sole purpose of enabling the appellant to secure exclusive privileges from hotels. Their effect was to enable the hotels to rent the exclusive use of public space on the public streets to the appellant at a large sum. It is a fair deduction to say that appellant must have paid close to $20,000 annually for this actual rental of public space on public streets from the owners of hotels.

The taxicabs of the appellant are a common sight upon our streets and avenues; each of them contains in conspicuous places on the panels of the side doors, on the front, and on the rear in large letters the initials "T. T. Co.," thus proclaiming the nature of its public business and public use and differentiating it clearly from any sort of a private service. These things are known to all of us. They are matters of public knowledge. They are so intimately connected with our daily life and observation as to become a part of it.

So intimately is the public taxicab service associated with our daily transactions that we have come to regard it as a frequent element in our business affairs, using it when occasion demands and depending upon it in cases of emergency. The engagements of our business men are not infrequently made in dependence upon it. It has become in this age of rapid transportation an essential part of our

transportation system. The taxicab business, as conducted by the appellant, from its very nature and from modern conditions, which have called it into being, has become of such public consequence as to impress it with a public use.

It may be broadly stated that the common law itself gives to the judicial department of government in its enforcement a right of control over any instrumentality of public service which has become impressed with a public use, and this right of regulation and control has been from time to time exercised by the courts independent of statutory assistance for more than two centuries in controversies between individuals.

The right to and the extent of the control and regulation *by the State* through appropriate agencies of business conducted by individuals or corporations is determined and measured by the legal status of the business. If the business is private, that is, one in which the public has only the most general concern, the control of the State goes no further than such police regulation as the public welfare and safety demands. If the business is public, the character of control is different and its extent greater.

The difference is in the kind and character of control and not one of degree. The causes of this difference are economic rather than legal.

Different industrial economic conditions existing from time to time have called into operation certain principles of the common law applicable to service to the public, and these principles have often been adequate without legislative supplement.

In England the medieval system of established monopoly demanded indiscriminate service from those engaged in almost all employments. The blacksmith, the tailor, the miller, the surgeon, the baker, the innkeeper, the ferryman, the wharfinger, and the carrier being few in number, the necessity of the times impressed these callings with a public use to such an extent that their services or supplies were

legally demandable indiscriminately under the coercive force of the common law. In later centuries the expansion of trade overcame the public necessity for the application of this law as to most of these callings, so few, save the innkeeper and the carrier, remained impressed with a public use. The regulation ceased when the necessity for its exercise ceased, just as it came into existence when the necessity for its existence called it into operation. The right of control remained with the State. It will always remain with the State to be exercised when the necessity arises. It is a right which every individual has surrendered to organized society, and its exercise is dependent only upon the necessity for its use.

The common law requiring public service from those *professing a public calling* exists ready instantly to deal in individual instances with every public employment at the moment of its recognition as such, and this occurs at the *moment of its profession*, or at the moment when the industrial condition at any given time and the public necessity create conditions which impress upon any calling such public use. The legislature, acting upon the same legal principle, enforces this law *generally* by statutory expansion of the common-law principle, so that organized society may enjoy a benefit and protection which the common law afforded only to such individuals as sought its assistance by judicial process.

When general public necessity demands a certain service to meet a general need, the service itself becomes impressed, stamped, labeled and marked as a public service, and from the necessities of organized society becomes a business impressed with a public use.

The characteristic element of the peculiar law governing those engaged in a public employment was the legal imposition of affirmative duty upon those who openly professed and exercised it. As was said by Lord Hale in the case of the wharfinger—"whenever the King or a subject has a

public wharf to which all persons must come who come to that port to unload their goods"—in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, etc., but the duties must be reasonable and moderate, for now the wharf and crane and other conveniences are affected with a public interest and they cease to be *juris privati* only (Hargrave Law Tract, 78).

The philosophy of the law lays down a general principle that whether a business is public or not depends upon the situation of the public with respect to it. If the situation of the public with reference to the business is such that the general public welfare has become dependent in some substantial respect upon it, and it has become of such public importance that the public welfare demands the service it renders, at that moment the public has an interest in the conduct of this business by its owner. It is affected with a public interest because it is carried on in such a manner as to make it of public consequence. Therefore those engaging in it having devoted their property to a use in which the public, as a public, has an interest have in effect granted to the public an interest in that use, and must submit to be controlled by the State for the common good to the extent of the interest they have created.

The books will be searched in vain to find a more illuminating case than that decided by the Supreme Court of the United States in Munn *vs.* Ill., 94 U. S., 83. In that case the legislature of Illinois had attempted to fix by law the maximum charges for the storage of grain in warehouses at Chicago and other places in the State and required public warehousemen to procure licenses in which this maximum charge was fixed. Munn & Company, a private partnership, not a corporation, were informed against for doing business without such license, and thereupon questioned the constitutionality of the statute, particularly charging that it was violative of that part of the Fourteenth Amendment of the Constitution which ordains that no State shall deprive any

person of life, liberty, and property without due process of law, etc.

In deciding this case, Mr. Chief Justice Waite used the following language:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *vs.* R. R. Co., 27 Vt., 143, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *Sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as was said by Chief Justice Taney in the License cases, 5 How., 583, 'are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the Government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for service rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the 5th Amendment in

force, Congress, in 1820, conferred power upon the city of Washington 'to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates for fees therefor, * * * and the weight and quality of bread,' 3 Stat. at L., 587, sec. 7; and in 1848, 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen and draymen, and the rates of commission of auctioneers,' 9 Stat. at L., 224, sec. 2.

"From this it is apparent that, down to the time of the adoption of the 14th Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we we may determine what is within and what without its operative effect. Looking, * * * then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

* * * * * * *

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well-established principle in social science, and that statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner."

Although a strong dissenting opinion was filed in the Munn case, it was followed in many State decisions. The principle therein laid down was brought to the review of the Supreme Court of the United States in Budd *vs.* New York, 143 U. S., 517, and its doctrine, after elaborate consideration, was reaffirmed. The charge was made at the bar of the Supreme Court that such a doctrine had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the business and affairs of life and the price of all commodities, but this did not deter the court from firmly reannouncing the doctrine.

The last word of the Supreme Court of the United States on this subject is found in the case of the German Alliance Insurance Company *vs.* Lewis, decided by that court on April 20, 1914, and as yet unreported in the official reports. It may be read in United States Supreme Court Advance Opinions of June 1, 1914, No. 13, page 613. The legislature of the State of Kansas passed an act permitting the Superintendent of Insurance to determine whether the rates of fire insurance were excessive or unreasonable, and, if found to be so, to fix a lower rate. It was contended by as able counsel as there are at the bar of that court that the business of fire insurance was a private business, a natural right, receiving no privilege from the State; that its

contracts were voluntarily entered into and could not be compelled nor could any of its exercises be compelled; that it concerned personal contracts of indemnity against certain contingencies merely, and that its contracts were a matter of purely private negotiations and agreement and necessarily there must be freedom in fixing their terms; that the exercise by the State of this power of attempting to fix rates was the taking of private property for public use without compensation, and that the State was thus attempting to impose unconstitutional burdens upon private citizens or private corporations engaged in a purely private business. It was urged upon the court "that where the right to demand and receive services does not exist in the public, the correlative right of regulation as to rates and charges does not exist." In disposing of this contention the court uses the following striking language:

> "In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern, and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor of the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property,

and whether the public has a legal right to the use which cannot be denied,' or, as we have said, quoting counsel, 'Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test as applied excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. *The distinction, we think, has no basis in principle* (Noble State Bank *vs.* Haskell, 219 U. S., 104; 55 L. Ed., 112; 32 L. R. A. (N. S.), 1062; 21 Sup. Ct. Rep., 186; Ann. Cas. 1912A, 487), *nor has the other contention that the service which cannot be demanded cannot be regulated.*"

As has heretofore been observed, that which was once considered a purely private business becomes one impressed with a public interest when changing conditions create a situation where it has become of such public consequence that the public welfare demands its regulation. This is noticeably so in the supplying of gas and electric energy for illumination, heat, and power. When the first gas works were constructed new conditions in the supply of illumination were created. The earlier American cases held that the proprietor of the gas works was as free as the owner of any factory to sell his product as it should please him best, and the courts declined to interfere with them in their dealings with the public. Thus in Paterson Gas Light Company *vs.* Brady, where the plaintiff complains that, although his buildings were located upon the lines of the main pipes of the defendant company, it refused to furnish him with gas although he was willing to pay the fixed price, the court said:

> "The language of the charter is throughout permissive and not compulsory. The company may organize and sell gas or not at its pleasure; and I see no more reason to hold that the duty of doing so is meant to be imperative, than to hold that other companies incorporated to carry on manufactures or to do any other business, are bound to serve the public any further than they find it to be their interest to do so" (3 Dutch, N. J., 245).

This decision was rendered in the year 1858 and decisions of a similar import were rendered in Connecticut, Massachusetts, New York, Ohio, and Pennsylvania. These cases still have an historical interest, although they have long since become obsolete even in the jurisdiction which decided them.

The honor of being the first to point out the essential change brought about by new conditions belongs to the Supreme Court of Wisconsin. In the case of Sheppard *vs.* Milwaukee Gas Light Company, 6 Wisc., 539, Mr. Justice Smith said "that the gas company was bound to sell its gas to every citizen of Milwaukee upon compliance with such regulations only as the company might rightfully impose. Corporations of this kind," he said, "are not like trading or manufacturing corporations whose productions may be transported from market to market throughout the world. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success, and upon no other place. From the nature of the article, the objects of the company, their relations to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation," and held that it was subject to regulation as a public service corporation.

The United States Supreme Court in the case of Gibbs *vs.* The Consolidated Gas Company, 130 U. S., 396, fully sustained the foregoing principle, and it is undisputed today in any State in the Union.

In the present generation illumination and power from

electric energy have become public necessities and of such public consequence that the fact that they were impressed with a public use has never been seriously questioned in any State in the Union. This is most significant. It shows that the law of public service has now such general recognition that in every instance similar in character to those quoted it will be applied by the courts without hesitation. The language of Mr. Justice Carter in the case of Snell *vs.* Clinton Electric Light Company, 196 Ill., 626, is very significant and fundamental. He says:

> "There is no statute regulating the manner under which electric light companies shall do business in this State. They are therefore subject only to the common law, and such regulations as may be imposed by the municipality which grants them privileges. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. Both reason and authority deny to a corporation clothed with such rights and powers and bearing such a relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. The Company was bound to serve all its patrons alike; it could impose on the plaintiff in error no greater charge than it exacted of others."

It was argued in the court below that because the charter of the appellant granted to it by the State of Virginia, after giving to it every possible power that a corporation of that character could use for a public service in its broadest and most complete signification, uses these words: "but not to exercise any of the powers of a public service corporation." Although, as we have stated, the powers exercised and the duties assumed by the appellant are such as to amply impress its public nature upon it, yet it seeks to escape regulation by the suspicious presence of this disabling clause in its charter. Curiously enough this question is likewise settled by reference to a principle both of law and morality

antedating the written decision of any court, but first expressed in legal concrete form in an old English case reported three hundred years ago. Cross *vs.* Andrews, Cr. Eliz., 622. In this case an innkeeper had been sued for failure to keep safely the goods of his guests and pleaded that at the time the guest lodged with him he was sick and of non-sane memory. On demurrer this was held to be not a good pleading. The court in passing upon it uses the following quaint but expressive language:

> "For the defendant, if he will keep an inn, ought at his peril to keep safely his guests' goods; and although he be sick, his servants then ought carefully to look to them. And to say he is of non-sane memory, it lieth not in him to disable himself."

Three hundred years later this old case was quoted with approval in the case of the Albion Lumber Company *vs.* De Nobra's Adm., 44 U. S. App., 347, wherein it was held that where a private corporation operating a private narrow-gauged line for the transportation of lumber and with no authority to act as a common carrier still became liable as a common carrier for injury to a passenger which it had assumed to carry. It could not be heard to say that it had disabled itself from doing that which it was actually doing, so with the appellant here today, it "lieth not within itself to disable itself" as to those things which it is actually doing.

There is no sort of question that its profession of public employment stamps the business of the appellant indelibly with its public nature and subjects its use to public regulation as I have indicated. The appellant has advertised itself publicly on the most conspicuous part of the local telephone directory inviting all who read to make use of its service. This invitation is general. It is addressed to no particular person or class of persons, and is without reservation. Its inviting advertisements, with cuts of the vehicles which it uses, are seen daily by thousands of readers of the daily papers of the District of Columbia. This invitation speaks

to them from the programs of theaters and from the conspicuous lettering of its taxicabs. As was said by the court in Lloyd *vs.* Hough and K. Storage and Transfer Company, 223 Pa. State, 148: "These advertisements speak for themselves and unquestionably establish the fact independent of everything else in the case that the defendant does hold itself out to the public." Similar language may be found in Sears *vs.* Eastern Railroad Co., 14 Allen, 433; Schloss *vs.* Wood, 11th Colo., 287.

The claim was unsuccessfully attempted to be made in the court below that in some instances the appellant held that it had the right to refuse service and that for this reason it was not a common carrier. In a recent case, where a trucking company, which had solicited business by public advertisements, sought to show when sued for a loss, that they have often refused to serve particular applicants and were, therefore, not common carriers, the court uses this sharp and pertinent language:

> "To claim that one is not a common carrier because he has persistently disregarded his duty and has arbitrarily chosen whom he would serve notwithstanding that he has invited the public generally to apply is to make a public duty determinable by the pleasure of the individual, and not by principle or law." Lloyd *vs.* Hough, etc., 223 Pa. St., 148.

The foregoing citation of authority we think is sufficient to demonstrate that the Terminal Taxicab Company is properly within the jurisdiction of the Public Utilities Commission of the District of Columbia for such regulation as to its service and rates as the public interest demands.

Speaking generally, there can be no question that the appellant has, by reason of its contracts with the Washington Terminal Company and certain Washington hotels, and by other agreements with private schools, theaters, Turkish baths, mercantile establishments, and many other places where the public congregate, endeavored to and to a large

extent monopolize the transportation of the public so far as taxicab service is concerned. There can be no question that by its contracts with certain hotels it has directly monopolized public space on the public streets and accomplished by indirection that which is forbidden other transportation agencies. The taxicabs used by the appellant in its transportation of the public are handsome, expensive, and commodious vehicles, propelled by gasoline motors, capable of great speed and power and of the conveyance of persons and property with greater directness and expedition than any other known means of transportation of this day. The general use of the telephone and its general installation all over the District of Columbia, both in private residences and in public pay stations, has rendered the command of the service of the appellant by the public more easy, practical, expedient, and possible than has heretofore ever been the case with any other carrier, and this public use is invited and this public employment professed and exercised, as I have indicated. The exigencies of the public under modern conditions and necessities, the insistent demand for rapid, certain, and elastic urban transportation, and the fact that such has been and is being met by taxicab service, has made it of the utmost public consequence, and impressed it with a public use which justifies its regulation by public authority.

The spirit of our present age demands that business enterprises, whether large or small, which have become of public consequence by reason of their nature and the manner and method of their operation shall be conducted in accordance with the requirements of organized society. The common law may be relied upon as a protection to meet, by the continual application of its fundamental principles, the complex conditions created by constant evolution in industrial development. Its remedial power is very great, but the effect of its action is limited to those individuals seeking its assistance. Supplementary legislation simply extends the

scope of usefulness of the existing common-law principle to compel for all what the individual could compel for himself under the common law. The efficient regulation of agencies professing and conducting public employment is being effectuated by legislatures and supported by the courts without hesitation. That those who profess and exercise a public employment owe the utmost public service must be generally accepted as the fundamental principle upon which the laws governing public employment should be based, and it may be fondly hoped that in the years to come the enlightened selfishness of public utility agencies may find it safer voluntarily to comply with proper regulation than blindly to oppose it, for continued opposition can have but one result—more drastic legislation or public ownership.

At first glance it might be thought that the Munn case and cognate cases which I have quoted both in the Supreme Court of the United States and State courts present in each instance either the application of a statute to a certain peculiar condition or at the most an illustration of the evolution of the law. They do not. They present the application by legislation of one of the eternal principles of the common law. They simply proclaim the existence of the principle and the broadening of its remedial nature by legislative supplement. The statute gives to the whole community simply the protection which the common law gave to the individual. The accuracy of this statement is well sustained by the language of the court in the case of Budd *vs.* New York, 143 U. S., 517, in which the doctrine of the Munn case was first reaffirmed and the language of Judge Andrews who decided this case below quoted with approval when he said that the attempts made to place the right of public regulation in the cases in which it had been exercised upon the ground of special privilege conferred by the public upon those affected could not be supported. "The underlying principle," he continues, "is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation."

In the German Alliance Insurance Company case the United States Supreme Court, in recognizing the principle laid down by Lord Chief Justice Hale, as controlling the Munn case, said:

> "And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, 'for the application of a long-drawn and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.' The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest."

It is not remarkable that in recent years those representing great business interests which have become so essential to modern civilization should resist to the utmost the application of the principle announced by Lord Hale. Every dictate of selfishness and self-interest impelled them to the opposition of the application of this principle where private rights conflicted with their interests, or public rights were sought to be established by supplementary legislation. The best ability of the legal profession has been summoned to hinder, thwart and delay the regulation by the public of the service and rates of business essential to its welfare. But this opposition, although severe and stubborn, has proved short-sighted and vain.

Respectfully submitted,

CONRAD H. SYME,
General Counsel, Public Utilities Commission,
Attorney for Appellees.

TERMINAL TAXICAB COMPANY, INCORPORATED, *v.* KUTZ, NEWMAN, AND BROWNLOW, COMMISSIONERS AND CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 348. Argued May 2, 3, 1916.—Decided May 22, 1916.

In determining whether a corporation is or is not a common carrier the important thing is what it actually does and not what its charter says it may do.

A corporation authorized by its charter to carry passengers and goods by automobiles, taxicabs and other vehicles, but not to exercise any of the powers of a public service corporation, and which does such business, including the carrying of passengers to and from railroad terminals and hotels under contracts therewith, and also does a garage business with individuals, *held*, in this case, to be a common carrier within the meaning of the District of Columbia Public Utility Act of 1913, and subject to the jurisdiction of the Public Utilities Commission, as to the terminal and hotel business, but not as to the garage business.

Such a corporation is bound under the Public Utilities Act to furnish information properly required by the Commission in regard to its terminal and hotel business, but not as to its private garage business; and an order of the Commission requiring information as to all classes of business should be so modified and limited as not to include an inquiry into such garage business.

In this case *held* that the omission from a general order of the Commission of concerns doing such a small volume of business as, in the opinion of the Commission, did not bring them within the meaning of the Act did not amount to such a preference as to deny those affected by the order the equal protection of the law.

43 App. D. C. 120, modified.

THE facts, which involve the construction and application of the provisions of the Act of March 4, 1913, creat-

ing the Public Utilities Commission of the District of Columbia, are stated in the opinion.

Mr. G. Thomas Dunlop for appellant.

Mr. Conrad H. Syme for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to restrain the Public Utilities Commission of the District of Columbia from exercising jurisdiction over the plaintiff. The Commission was created and its powers established by a section (§ 8) of an appropriation act, divided into numbered paragraphs. Act of March 4, 1913, c. 150, § 8. 37 Stat. 938, 974. By paragraph 2 of the section 'Every public utility is hereby required to obey the lawful orders of the Commission,' and by par. 1 public utility embraces every common carrier, which phrase in turn is declared to include 'express companies and every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire.' Steam railroads, some other companies, and the Washington Terminal Company are declared not to be within the words. The main question is whether the plaintiff is a common carrier under the definition in the act. The bill was dismissed by the Supreme Court and the decree was affirmed by the Court of Appeals. 43 App. D. C. 120.

The facts are agreed. The plaintiff is a Virginia corporation authorized by its charter, with copious verbiage, to build, buy, sell, let and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles; but not to exercise any of the powers of a public service corporation. It does business in the Dis-

trict, and the important thing is what it does, not what its charter says. The first item, amounting to about thirty-five hundredths of the whole, is done under a lease for years from the Washington Terminal Company, the owner of the Union Railroad Station in Washington, which we have mentioned as excluded from the definition of common carriers. By this lease the plaintiff has the exclusive right to solicit livery and taxicab business from all persons passing to or from trains in the Union Station, and agrees in its turn to provide a service sufficient in the judgment of the Terminal Company to accommodate persons using the Station, and is to pay over a certain percentage of the gross receipts. It may be assumed that a person taking a taxicab at the station would control the whole vehicle both as to contents, direction, and time of use, although not, so far as indicated, in such a sense as to make the driver of the machine his servant, according to familiar distinctions. The last facts however appear to be immaterial and in no degree to cast doubt upon the plaintiff's taxicabs when employed as above stated being a public utility by ancient usage and understanding, *Munn* v. *Illinois*, 94 U. S. 113, 125, as well as common carriers by the manifest meaning of the act. The plaintiff is 'an agency for public use for the conveyance of persons' &c.; and none the less that it only conveys one group of customers in one vehicle. The exception of the Terminal Company from the definition of common carriers does not matter. The plaintiff is not its servant and does not do business in its name or on its behalf. It simply hires special privileges and a part of the Station for business of its own.

The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about

the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389. The public does not mean everybody all the time. See *Peck* v. *Tribune Co.*, 214 U. S. 185, 190.

The rest of the plaintiff's business, amounting to four-tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service and no doubt would do so if the pay was uncertain, but it advertises extensively and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the Station and hotels. There is no contract with a third person to serve the public generally. The question whether as to this part of its business it is an agency for public use within the meaning of the statute is more difficult. Whether it is or not, the jurisdiction of the Commission is established by what we have said, and it would not be necessary to decide the question if the bill, in addition to an injunction against taking jurisdiction, did not pray that Order No. 44 of the Commission be declared void. That order,

after declaring that the plaintiff was engaged in the business of a common carrier within the meaning of the act and so was within the jurisdiction of the Commission, required the plaintiff to furnish the information called for in a circular letter of April 12, 1913. What this information was does not appear with technical precision, but we assume that it was in substance similar to a later requirement of a schedule showing all rates and charges in force for any service performed by the plaintiff within the District or any service in connection therewith. If we are right this demand was too broad unless the business from the garage also was within the act. There is no such connection between the charges for this last and the others as as there was between the facts required and the business controlled in *Int. Comm. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 211.—Although I have not been able to free my mind from doubt the Court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable. It follows that the plaintiff is not bound to give information as to its garage rates.

Complaint is made that jurisdiction has not been assumed over some other concerns that stand on the same footing as the plaintiff. But there can be no pretence that the act is a disguised attempt to create preferences or that the principle of *Yick Wo* v. *Hopkins*, 118 U. S. 356, applies. The ground alleged by the Commission is that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act. There is nothing to impeach the good faith of the Commission or to give the plaintiff just cause for complaint. The decree so far as it asserts the jurisdiction of the Commission is affirmed, but it must be modified so as to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same.

Decree modified as above set forth.